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Judges of the Madras High Court

1955 (January—December)

CHIEF JUSTICE.

The Hon'ble Mr. P. V. Rajamannar, B.A., B.L.

PUISNE JUDGES.

The Hon'ble Mr. Justice P. Govinda Menon, B.A., B.L.
" " P. Rajagopalan, I. C. S.
" " N. Somasundaram, B.A., B.L.
" " A. S. Panchapakesa Ayyar, M.A., I.C.S.,
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Mr. S. Govind Swaminathan, *State Prosecutor.*

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THE
LAW WEEKLY

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OURSELVES.

Entering on the forty second year of our service to the legal profession, we wish our subscribers a Happy and Prosperous New Year. It is not without some pride and satisfaction that we look back upon our past record of usefulness to all those engaged in the administration of justice in our country despite manifold handicaps and the travails of two global wars that convulsed our country. But for the increasing encouragement of our patrons uniformly vouchsafed to us we must confess, we must have significantly lagged behind our competitors in the field of legal journalism. As it is, however, we are gratified to consider that our services have been appreciated in full measure and the support from the legal public in the future for our endeavours is assured to us in no small degree.

What with the separation of the Andhra High Court and the Moratorium Act, the income of the Madras lawyer has received a set back, but it is hoped, it will be only a temporary phase. It cannot be gainsaid that there are clear indications of a general improvement in the well being of the people of our State. The rains have been plentiful, and though here and there the menace of the pests is still lingering, on the whole, it can be said, our country is fast progressing towards plenty and contentment. The prices of the food-stuffs are coming down and the grains are in plentiful supply. The skeleton of poverty and starvation is fast disappearing and it is hoped that with the improvement of the economic conditions of the people in general the income of the lawyer will also increase, sooner than later.

The separate constitution of the Andhra High Court, though manned by Judges who went from us cannot but be contemplated without some regret. The familiar faces of many of our Andhra friends are missing and it is doubtless that the admixture of their joviality and social habits in the professional life of ours hitherto imparted to it a richness and variety which were really welcome. But now their going away has left the High Court practically empty and the corridors and the Court rooms which often resounded with their voice and eloquence have become somewhat silent. We are, however, assured that our friends who have gone away to Guntur are doing well and their happiness must make up for our regret.

Another significant event in the year left behind which threatens to repeat itself, in what form or shape it still remains to be seen, is the enactment of the Moratorium Act. The result of it was that several Courts had to be abolished and in some of the Courts which have been retained, as one prominent leader of a mofussil Bar humorously observed, Judges come at 11 A. M. and leave by 10-30. One may pertinently ask, what is the good that the Government have achieved by this enact-

ment. It has only allowed the interest to accumulate. It has encouraged the agriculturists not to keep their word to the creditors. It has undermined completely the rural credit with the result that even for agricultural necessities the farmers are not able to raise the wherewithal. The Government is threatening to re-enact this measure in some modified form in this year. We hope better counsels will prevail and will induce them to desist from such a measure which will be prejudicial to the interests of the agriculturists.

While the economic stability of the Madras State is being thus jeopardised and an uncertainty is put in the minds of the middle classes who are after all the backbone of any civilized nation, another threat to vested interests is being held out from the centre in Delhi by way of a move for Amendment of the Constitution. Art. 31 of our Constitution, hammered out after prolonged and anxious deliberation by the accredited experts in Constitutional Law, is now sought to be amended in haste at the instance of a couple or so of politicians who, taking advantage of their command of the majority vote want practically to abolish property rights in the country. Deprivation without compensation is nothing short of confiscation and that is what the sponsors of the amendment seek to achieve. They forget that a Constitution, as contrasted with and distinguished from the ordinary law of the land is a sacred instrument to which the legislature, the judiciary and the executive ought to show implicit respect and this is clear from Art. 13 of the Constitution which emphatically and categorically condemns making of all laws contrary to the provisions of the Constitution. This Art. 13 is on the same lines as the corresponding Article of the Japanese Constitution which the makers of our Constitution had in view. But the Supreme Court, has however held that the Central Legislature could amend the Constitution, provided it conforms to the conditions prescribed therefor in Art. 368. Be that as it may, it could never have been the intention of the framers of the Constitution that the property rights of the citizens could be taken away without compensation if the State so wishes. This is a dangerous dogma in political statecraft and where it will lead to, it is difficult to foresee. A too willing readiness to change the Constitution to suit the purposes of a party in power is practically negativing the security and certainty of rights and freedoms which a citizen locks for in a Constitution. Another party coming to power with different policies and outlook regarding property rights may also, having regard to the precedents created by such amendments, resort to practically subvert the Constitution and annihilate its protective provisions leading at any time to chaos and revolution in the political make up of the country. It is therefore up to every responsible citizen, lawyer and politician of our country to see that this both suicidal and homicidal amendment to the Constitution does not become an accomplished fact. To tolerate it is to incite all the sufferings and tyrannies that one hears of in some other countries where the sacredness of property right is not respected. The plea on the part of the Executive that the power of acquisition without adequate compensation which they now seek by the Amendment, will not be abused and misused by them and that they can be trusted to give proper compensation whenever an acquisition is made, smacks of the assurance of the Stork to the Crabs in the *Panchatantra* and is highly suspicious. If really the Executive's assurance that no acquisition will be made without reasonable compensation is genuine, why not Art. 31 remain as it is and why should it be amended cutting out from its express provision the safeguard of compensation? To yield to the Executive's specious argument is likely to result in locking the stable after the horse is. stolen.

In the international sphere of influence there can be little doubt, our country stands supreme and above the rest of the World. The significance of this position is all the greater

on account of the comparative military weakness of our county, measured in terms of war materials, arms and ammunition. The influence is moral and the fact that both the East and the West vie with each other in clasping the hand of friendship of India is an eloquent demonstration of the superiority of the moral force over the mechanical instruments of destruction of the possession of which some other countries may well boast. Pandit Jawaharlal Nehru than whom probably there is none more universally respected and resorted to for advice in all international frictions in recent times is an ideal product of the genius of the Indian Nation and its cultured pacifism and while no one can deny to himself the pride that he belongs to the country that has produced this great man, one at the same time finds oneself in despair when the question is put, who is fit to take his place either now or in any future. One sincerely wishes that as Mahatma Gandhi chose a proper political successor in Jawaharlal Nehru the latter in his turn will select and train a few young men of both character and capacity who may be competent to take his place if he is for any reason forced to retire from his position of pre-eminence in the politics of our country. We are not prepared to believe that our country has become bankrupt of men of such character and capacity. Only the selection has got to be made carefully and correctly by the persons qualified for the job.

Another matter to which we would like to draw the attention of the Judges and the lawyers is the very valuable suggestion made by Mr. Patanjali Sastry in his address to the Madras State Lawyers' Conference held on the 29th December, 1954, that compulsory printing of records in appeals involving as it often does enormous and unnecessary drain of the poor client's money may be dispensed with and the lawyers be permitted to supply the papers in type, if necessary. This has been long our settled view on the matter. The system of printing which originated when our High Court was manned by Judges imported from abroad who were not acquainted with the vernaculars of our country, need not hereafter be continued since the Judges are our own Judges who can read and understand the vernacular documents in the various cases. The abolition of printing, apart from the saving of unnecessary expenditure for the client will tend to facilitate the ready payment of fees due to the lawyer and avoid the delay that is invariably caused in the process of printing. We are led to make this observation because we find as a matter of fact some of the District Judges and Subordinate Judges disposing of the appeals before them most satisfactorily within a few months after their filing. We venture to submit that the abolition of compulsory printing will result in similar expedition in the disposal of appeals in the High Court, a phenomenon very much desiderated by the entire legal public. While here we are gratified to note our Judges not being very particular even in First Appeals about refusing to look into and base their conclusions on unprinted records. We hope instead of having stray instances the matter may be reduced to a system of optionality in the matter of printing leaving the discretion to print or not to print to the Counsel concerned as it now obtains in Second Appeals.

One other contribution by the State Lawyers' Conference, by way of a very pertinent and valuable suggestion for the improvement of the higher judiciary in the country was the constitution on an All India basis of the High Court Judiciary. The idea behind this is that a High Court Judge recruited from one State should be freely and even normally be appointed to the High Court in another State so that any possible charges against a particular Judge of parochial or personal attachments may have no place. At least for one reason we would very much welcome the arrangement of Judges recruited in our State being posted to function as Judges of other High Courts as that would give us an opportunity of impressing the rest of India of the capacity and learning for which our State has always been justifiably famous.

Proceedings of the Ninth Madras State Lawyers' Conference

The Ninth Provincial Lawyers' Conference (now altered by resolution as 'State Lawyers' Conference) was held with outstanding success on the 29th and 30th of December last in the spacious and inspiring premises of the Vivekananda College, Mylapore. The organisers secured the presence of Sri N. C. Chatterji, M. P., Ex-Judge of the Calcutta High Court and a leading counsel practising before the Supreme Court of India, to inaugurate the conference and of Sri M. Patanjali Sastriar, retired Chief Justice of India to preside. The organising committees were manned by several of the leading and outstanding members of the legal profession in Madras of great experience and influence in the city particularly in regard to the holding and conducting of such functions. The immediate venue of the conference was a most spacious and artistic pandal put up more or less as auditorium for the new stage of the open air theatre constructed by the authorities of the college and declared open on the 27th December by Dr. C. P. Ramawami Iyer. Arrangements for seating a huge audience of several hundreds and for amplifying sound to be just and comfortably audible without amounting to a nuisance were made with taste and perfection. Hundreds of delegates from the various mofussil districts enthusiastically attended and contributed to the success of the conference in several ways. The inner man was taken care of in a manner as to make the conference premises almost a home from Home. One very welcome and new feature of the conference was the association with the holding of the conference of the apprentices-at-law serving their terms of apprenticeship in Madras and elsewhere in the State, many of whom rendered valuable service as volunteers and in various other capacity. There is no doubt that the experience and contact with their seniors in the profession enjoyed by them during the conference will be of great benefit to them in several ways.

The flag hoisting ceremony initiated very fittingly the proceedings on the morning of the 29th December almost about the time fixed for it. The National flag was hoisted by our Chief Minister Sri Kamaraj with befitting dignity and perhaps the shortest speech on record. Sri Kamaraj, as was remarked later on by a respected senior member of the bar, set a fine example to others, whether ministers or not, functioning similarly, that on such a solemn occasion long speeches should not be made.

The inauguration of the conference then followed after a short prayer and the reading of various messages received from leading personalities in the country. It was a piquant incident when our popular Chief Justice Sri P. V. Rajamannar sitting on the dais along with the President and Mr. Chatterji heard a message from himself read out on the occasion. It served to put the huge audience into immediate good humour and a feeling of anticipation of further enjoyment.

The inauguration was made by Mr. N. C. Chatterji with a splendid prepared speech of great clarity and terseness dealing with all the important questions of the day concerning the legal profession. The outstanding subjects of course were the proposed Amendments to the Constitution of India and Mr. Chatterji's opinions with regard thereto were expressed in a forthright and unambiguous manner definitely deprecating such amendments on very convincing grounds. He also touched on the desirability of creating an All India Bar and All India Judiciary. He paid glowing tributes to the Madras Bar and the pre-eminent position it had been occupying for many decades past.

He was followed by Sri Patanjali Sastriar, Retired Chief Justice of India whose presidential address was characterised by a dignified and firm tone in dealing with important questions of the day and particularly with the Amendments proposed to be made to the Constitution. Coming as it does with his rich and invaluable experience on the Bench of the Supreme Court for several years particularly in regard to the working of the provisions of the Indian Constitution, his opinions immediately evoked rapt attention and respect from the large assembly. He made no bones about expressing his unqualified disapproval to the proposed amendments and sounded a very timely note of warning against such tinkerings with an institution of such sanctity to suit mere political exigencies arising from time to time. We feel that it would require courage in the highest degree on the part of the responsible authorities to disregard opinions expressed in the conference by such persons of eminence and distinction in regard to the proposed amendments.

Another very interesting and educative feature was the programme for the afternoon of the first day and that was a Symposium of four eminent men in the legal profession giving their views on the proposed amendments to the Constitution. Messrs. K. V. Venkatasubramania Aiyar, Thaikaud Subramania Iyer, Mohan Kumaramangalam and M. K. Nambiar are all persons well-known for their deep study of the Indian Constitution and it was really a happy choice made by the organisers of the conference in requesting these gentlemen to voice their considered views on the various proposed amendments. As may be expected, it was a brilliant summing up of the cases for and against the amendments crowned by a very clear and cogent analysis by the Advocate General, Madras, as the observer. The observations of Sri N. C. Chatterji that the level of the discussion in the Symposium was of such a high order as has not been reached to his knowledge on any other occasion cannot in any way be said to be exaggerated. Sri Venkatasubramanya Iyer dealt in a masterly way with the proposal to amend Art. 31 and pointed out that though the Constitution itself contained provisions for being amended, no such amendment should lightly be contemplated without providing the necessary safeguards against such amendments resulting in the abolition or serious infraction of the elementary rights to private property and personal liberty. He made out a strong case against the proposed amendments. Sri Thaikaud Subramania Iyer, Ex-Advocate General of Travancore-Cochin State revealed his great knowledge and mastery of the provisions of the Indian Constitution in a speech which was remarkable for its learning and subtle humour. He built up a strong case against all the proposed amendments and pointed out the undesirability of the legislature producing a spate of hasty, ill-considered and ill-drafted measures in an over-zealous spirit of reforming society by their laws. He was followed by Sri. Mohan Kumaramangalam who as may be expected complained that the proposed amendments with regard to Art. 31 do not go far enough and that they should be made more radical and in consonance with the modern ideals of private ownership of property. He at the same time put in a very strong plea in favour of respecting the rights even of ownership to property by individuals who had by their own exertions or labour earned and were therefore entitled to enjoy it without being interfered with. He definitely condemned the proposed amendments with regard to the Preventive Detention of any individual on any account as it tended to interfere with the fundamental rights of freedom and liberty of speech and action. Mr. M. K. Nambiar more or less confined his speech to the proposed amendments to the Arts. 32 and 226 which sought to shut out the wholesome interference by the established Courts of the land with arbitrary and unjust actions of the executive. He sounded a note of warning against the executive and legislature doing anything by way of amending the present

powers of interference by the Supreme and the High Courts and said that the removal of such an effective check would only lead to chaos and injustice. His opinions based on a very considerable and intensive experience gathered in actual practice at the Bar, are entitled to the highest respect. The Advocate General of Madras in dealing with the entire discussion in the Symposium shortly gave his opinion of support in favour of the amendments to Art. 31 and expressed his personal view of dissent from any policy which might result in a larger interference with the personal liberty of the subject. In fact, he suggested that one should not condemn the proposed amendment to Art. 31 but should wait and see how it worked, after it was passed and if it resulted in a misuse of powers and injustice, it would be time enough to complain. Probably, he may not find very many to agree with him in that view, but it is sufficient for us to state that the success of the Symposium was all the greater on account of the frank expression of the differences of opinion on the part of authoritative persons who expressed them backed by good reason, thus ensuring the observing of the principle for which lawyers always stand, viz., hearing of both sides of the question before coming to a decision.

In the evening of the 29th, there was some interesting entertainment by the members of the Madras Bar and the Apprentices Association who staged great and interesting farces in Tamil and English respectively. They were greatly appreciated and helped very largely to afford the necessary relaxation from the long spell of serious and strenuous discussions on legal subjects.

The proceedings of the first day were wound up with a mammoth dinner served in the open to about 700 guests and various toasts were proposed and responded to in delightful post-prandial speeches. Of particular satisfaction to us is that in the toast proposed to the High Court and Judiciary, a handsome and fitting acknowledgment was made to the great work done by the members of the subordinate judiciary in the State under conditions of great hardship and difficulty. This was also acknowledged in unqualified terms by the Hon'ble Mr. Justice Govinda Menon who responded to that toast. We have no doubt that this public expression of confidence and appreciation will serve to hearten the members of the Judiciary outside the High Court and convince them that good work never goes unnoticed.

On the morning of the 30th, Dr. C. P. Ramaswamy Iyer spoke to the Conference on "the Bar and Regionalism in Law." As could always be expected of him, it was an interesting, instructive and well thought out speech keeping strictly to the lines of his subject and voicing a very strong case indeed against the present tendency of narrow regionalism of the territorial or linguistic kind on one side and the bigger regionalism on the other which tends to rush head-long towards introduction of Hindi in complete displacement of English within the time prescribed in the Constitution without regard to whether it could work with any degree of success. With his great knowledge and experience of men and things and various systems of administration in and outside our Indian Union, he drove home into the convictions of his audience the necessity to keep the administration of law and justice above narrow parochialism or provincialism of any kind which would surely be the result of regional languages or even Hindi driving out the English in such a short time from Courts.

The Hon'ble Mr. C. Subramanyam, Minister for Education, Law and Finance, Madras State, who presided while generally agreeing with the distinguished speaker was tempted to travel outside the ambit of the immediate subject under discussion obviously not being able to let go the opportunity to support the policy of his party behind the proposed amendments to the Constitution. We are even pr e

pared to allow that apart from any irrelevancy, the expression of his views in favour of the amendments could not be unwelcome to an audience entirely composed of legal men as it would present to them the other side of the question which had been dealt with before. But the Hon'ble Minister's speech took an unfortunate turn when he, perhaps in the excitement of the moment, allowed himself to cast aspersions on the judiciary of the country and went to the length of even asserting that the Executive were better fitted and qualified to decide on matters relating to just compensation than the judiciary. We are certain that the Hon'ble Minister, himself a member of the Bar, did not really mean to disparage the institution of the judiciary in such sweeping terms, but was only putting forward the official view. It is, of course, too elementary and too firmly established to be doubted, much less displaced, by any one, that even in a Welfare State, it is only the presence of a strong and intelligent judiciary that can continue to protect effectively the rights and privileges of citizens against wayward, and even tyrannical conduct on the part of political parties in temporary power. To foul the judiciary is to foul one's own nest and all present felt that no such remarks should have been made against the Supreme and the High Courts of our land who have within the very short period after the coming into force of the Constitution upheld it and its provisions with conspicuous ability and impartiality and established a very high tradition of independence and fearless justice. The principle that no man can be a Judge in his own cause is so paramount and of such eternal value that it is unnecessary even for a Constitution to provide for it or seek to protect it. It is as eternal as the very right of a human being to live and be protected and not even a unanimous decision or declaration of any legislature can derogate from that right to any extent or in any manner. Any executive whatever be its composition, whatever the eminence or importance of the people constituting it, will, still be only a contending party in a matter like the fixing of a so-called "just compensation" by its subordinate and the decision of any dispute regarding it, and for that very reason is totally disqualified from claiming to be the final Judge to decide such dispute. An honest political party in power should not be afraid of justiciability in regard to any of its actions or with regard to its being provided in any of the legislative measures brought forward by it and protestations of democratic rule and outlook begin to sound very hallow when essential and healthy checks like an independant and competent judiciary are sought to be either nullified or even weakened in any way. It will only mean totalitarism parading as democracy.

There was some discussion next about the desirability of having an All India Bar and Judiciary to bring about unity and co-ordination in the proper and efficient administration of justice. Sri M. Ananthasayanam Iyengar, Deputy Speaker of Parliament has obviously given much thought to this question and in his speech he put forward very many instructive proposals to achieve those objects. They are proposals which deserve to be considered with respect and even if they should not contain the entire solution to the problem, they certainly form a very useful frame work for building up a comprehensive machinery in the nature of an All India Bar and Judiciary. The objections to these proposals were not based on any broad principles of policy or reason but merely dealt with supposed difficulties of conflict of financial commitments between the State and the Central Governments with regard to salaries of Judges and the general undesirability of appointments in the State of men from outside the State as Judges, and so on. We are happy to note that these objections were not characterised either by anything like volume or weight behind them. They failed to rise above the narrow level of provincial or parochial outlook and appear to have been put forward merely as

opposition for opposition's sake. It is a subject which deserves to be considered at an All India level by persons of eminence and experience in the legal profession in whom our country even today is quite rich.

The Conference conculded after passing several resolutions of which the most noteworthy was that retired Judges should not be appointed to any Tribunals or any other jobs in Government. The principle behind this is unexceptionable and as was pointed out during the discussions it was felt that the resolution is intended to apply to Judges irrespective of whether they are of the Supreme Court or the High Court or even the Subordinate Judiciary. It was emphatically pointed out by the sponsors of the resolution which was carried unanimously that no judge should while still in service be enabled to look forward to any future preferment after his retirement by the grace of the executive inasmuch as it would not be conducive to independence and fairness in his work. Another resolution conveying the overwhelming opinion of the Conference against the proposed amendment to the Constitution was passed with little opposition.

The conference also brought out a Souvenir which gives the history of the Federation, the work done by it these years, and also contains some articles of interest and value from Judges and members of the Bar.

We heartily congratulate the organisers of the Conference for the outstanding success achieved and we have every reason to hope that the views so ably expressed on behalf of the legal profession in the State will be considered with due regard and respect by the concerned authorities before arriving at a final decision as to the proposed measures such as the amendments to the Constitution, increase of court-fee, displacement of English and so on.

We make a special plea that whatever may be the attempts made by interested parties to discredit the institution of the Bar, particularly with reference to its undoubted right to shape and lead public opinion in the matter of the making and administration of the laws of the country or whatever may be the shortcomings of the present generation of lawyers due to changed conditions of society or politics, the normal and healthy rule should never be relaxed or allowed to be weakened, that the most efficient machinery for administration of justice according to the just laws made by a just legislature is to combine the agency of the Bench and the Bar and that with regard to the public life of the country, in whatever sphere, the members of the Bar should always have a leading role to play by virtue of their knowledge and experience and training.

—o—

SAGHIR AHMED v. GOVT. OF UTTAR PRADESH 68 L. W. 8 (S. C.)

A Critical Review

By S. Rajagopalan, *Advocate, Madras.*

The decision in the above case touching the constitutional validity of schemes for the nationalisation of motor transport, is of profound significance in regard to the nature of the rights protected by Art. 19 (1) (g) and Art. 31 (2) of the Indian Constitution. The question arose in an appeal against the decision of the Allahabad High Court (A. I. R. 1954 All. 257), and their Lordships of the Supreme Court have, differing from Mukerji and Chathurvedi JJ., invalidated U.P. Act XI of 1951 on the ground of its infringing Art. 19 (1) (g) and Art. 31 (2). The legislation was also impugned under Art. 14 and Art. 301, but the contention did not prevail.

Certain owners of Motor Vehicles were plying their carriages for hire on the Bulandersha-Delhi route for a number of years past. In 1947, the U. P. Government conceived a proposal for nationalising motor transport, and began in the first instance with running its own buses along with those of the private operators. Ultimately, monopoly was claimed and to that end, the legislation in question was passed on 10th February 1951. The Act provided for a State Road Transport Service, and empowered the Government to run and operate the service on any route either exclusively or in conjunction with the railways or their private bodies, as well as to restrict their number of vehicles allottable for each permit.

Motor transport in India was originally governed by the Motor Vehicles Act VII of 1914, which permitted a somewhat unrestricted user of the roads. Latterly when traffic and transport grew in volume and largely as a result of the Mitchell-Kirkness Report, co-ordination of road and rail transport came to be attempted, resulting in the enactment of the Motor Vehicles Act IV of 1939, which contained, so to say, the germs of nationalisation. Unrestricted user now gave way to control at every step by the State through its transport authorities. S. 43-A typifies the plenary powers vouchsafed to the Government over motor transport in the country. It became henceforth obligatory on all owners of transport vehicles to obtain a permit before putting them on the road: and the vehicle could be used only in accordance with the terms of the permit. Finally, the issue of permits became purely discretionary with the authorities who alone were to decide whether to grant, continue or revoke them.

Two cases decided by the Supreme Court have emphasised the stringency of these provisions, in the context of their conflict with the Constitutional provisions. In *Veerappa Pillai v. Raman and Raman*, 65 L. W. 620 it has been held that the grant of a stage carriage permit was solely in the discretion of the transport authority and that no possessory rights could be claimed therein. In *Harman Singh v. Road Traffic Authority, Calcutta*, (1954) 1 M.L.J. 79, their Lordships have repelled an argument that restrictions by the authority to regulate tariff would offend Art. 19 (1) (g). An unequal tariff was introduced which placed baby taxi owners in a more advantageous position than big taxi owners, and it was complained that that would wipe out the latter completely from the roads, and prevent them from carrying on their trade or business under Art. 19 (1) (g). But the Court held that the Article does not guarantee a monopoly to an individual to carry on any occupation and that even if an element of competition be introduced into the business, that would not in the absence of bad faith, entitle him to relief under the Constitution, the more so because the matter was governed by the Motor Vehicles Act.

In the instant case, the owners applied for relief against the Government, prohibiting it from interfering

with their rights *except in accordance with the provisions of the Motor Vehicles Act IV of* 1939. They pleaded that their rights under Art. 14, Art. 19 (1) (g), Art. 31 (2) and Art. 301 have been violated.

Their Lordships agreeing with the High Court refused to apply Art. 14 because there had been no discrimination. What had been done was that certain routes had been chosen over which the private owners could not operate and the number of persons to whom the permits should be given had been restricted, all of which were governed by the Motor Vehicles Act.

Art. 301 guarantees freedom of trade and commerce throughout India, which individual States could restrict under Art. 304 (2). The question whether this could be resorted to by the petitioners was discussed at length in the High Court and negativ. ed. The Supreme Court has however left the issue open, namely, whether individual rights to carry on business secured by Art. 19 (1) (g) would also be protected by Art. 301. It is however submitted that these two provisions are not interdependent. Art. 19 (1) (g) is justiciable and inviolable, but Art. 301 is neither inviolable nor justiciable. Art. 13 does not apply to it. It is a general provision applicable to trade and commerce in general, not to traders or businessmen individually. It applies even to aliens and furthermore, is subject to the "existing law," (Art. 305). The decision of the Privy Council in *Common Wealth of Australia* v. *Bank of New South Wales*, 1950 A.C. 235 was under the Australian Constitution, which does not provide for individual rights and is, it is submitted, inapplicable to cases arising under our Constitution.

Dissenting from the High Court, their Lordships have held that the legislation infringed Art. 19 (1) (g) and hence is invalid. As the enactment was anterior to the amendment of Art. 19 (1) (g) (6), the decision would turn only on the provision as it stood before the amendment. Now, what is the exact nature of the right that had been infringed? Stated abstractedly, the petitioners have been deprived of the right to use the Bulandersha-Delhi route for carrying on their business as carriers. This right under the Motor Vehicles Act, IV of 1939 was, however, no unconditioned right. It is not one which could be granted automatically, as their Lordships meant to hold in *Veerappa Pillai* v. *Raman and Raman*, 65 L.W. 620. Even a permit holder might not be permitted to carry traffic; and the restrictions and interferences by the authorities, under S. 42, 47, 50, 55 as well as S. 43-A of the Act, are so numerous as to make it even non-existent. A stage carriage owner has to obtain a permit. Then his movements and tariff rates have to be under the surveillance of the authorities, who in turn might be checked and check mated by the Government. The new legislation has destroyed the right to obtain a permit to carry passengers along the specified routes. Art. 19 (1) (g) which confers a general right to carry on a trade or business has come to be abrogated, but this can be justified under Cl. (6) if under the existing law (*viz.*, the Motor Vehicles Act), it could be restricted reasonably to subserve the interests of the general public.

On the question whether "restriction" would imply total prohibition, their Lordships have declined to express a final opinion. As to this it is submitted that the problem may be viewed from a different angle. Art. 19 (1) (g) confers a general right to carry on a trade, business or occupation. Motor transport is but a category of a trade or business, and the State might well consider—and this in the interests of the general public—that this particular variety of business might better be carried on by it with its infinitely vast resources and personnel. Hence the citizen may be restricted in the field of his choice for trades or businesses and public transport which affects the general public may not be one of them.

A State as *parens patrie* has to engage itself in certain kinds of trading activities in the interests of public well being, which might even infringe private trade or monopoly. This is a part of its police power, and it has

been held in *United Shoes Machinery Co.* v. *United States*, 258 U. S. 451, that the regulation of monopoly would itself be a species of that power. In consequence the State is empowered to carry on a business and to that end establish zones in which certain types of business would be permitted or excluded. This would be not to augment public revenues but as a means of selling cheap goods to the people. For example, in *Jones* v. *City of Portland*, 245 U. S. 216, a municipal body was authorised to establish a depot to sell coal and fuel to its inhabitants at cost price. It was contended that this offended the equality clause (the 14th Amendment) but the Court held that the venture was undertaken to enable the citizen to be supplied with something which was absolutely necessary to the enjoyment of life and health and which could otherwise be obtained with great difficulty or expense or perhaps not at all. The Court had no authority under the 14th Amendment to supervise the legislation of the States in the exercise of the police power beyond protecting against arbitrary exertions having no reasonable relation to the execution of a lawful purpose, namely, to supply essential goods at cost price.

In *Nebbiah* v. *State of New York*, 291 U. S. 502, the State established a Milk Control Board entitling it to fix maximum and minimum prices for retail sales of milk. That body fixed a higher tariff for milk farmers and placed them in a more advantageous position than the other dealers. This was done to offset depression amongst the milk farmers. It was assailed as discriminatory, but the Court observed thus : "Under our forms of Government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute for Government cannot exist if the citizen may at will use his property to the detriment of his fellows or exercise his freedom of contract injuriously. Equally fundamental with the private rights is that of the public to regulate it in the common interest. The authority of the State to make regulations of commerce is as absolute as its power to pass health laws. ......". The guarantee of due process demands only that the law shall not be unreasonable, arbitrary or capricious and that the means the State adopts have a relation to the object sought to be attained.......... The Court has repeatedly sustained curtailment of the enjoyment of private property in the public interests."

In 217 U. S. 104, 110 (State Bank Guarentee Case) it was postulated that businesses like banking which affect the public at large are of such a character that no one could be said to have a vested right to engage in it.

In regard to public transport, which had also come up before the Courts, it was ruled that transport is a business of a public nature, and that the carrier is to a large extent performing the functions of the Government. The prohibition of such an occupation by an individual may be one of the reasonable necessities for the proper regulation of commerce. The legislature is the Judge of such necessity and propriety. The 14th Amendment (Art. 14) and the 5th Amendment [Art. 31 (2)] have no application and no compensation is payable by the Government. [*United States* v. *Joint Traffic Association*, 171 U. S. 505]. The Court restrained a combination of transport businessmen from standardising the rates, as that would hit the public at large.

The Indian Constitution envisages the State carrying on trade and business activities of its own. Art. 289 (2) specifically alludes to them, and Art. 38 and Art. 39 (6) (Directives of State Policy) imply that at some stage the State may have to take them up with a view to achieve the consummation set out therein.

On the authority of these decisions and of the provisions of the Constitution, it is submitted that the quantum of private rights exercisable in respect of essential services like transport

must be determined by the legislature and that the jurisdiction of the Court would be limited to the examination whether it would be a reasonable expropriation ; and it goes without saying that the decision depends very largely on the nature of the business. In the case of motor transport which affects every citizen, it seems reasonable that it should be in the hands of an agency with unlimited resources, which will not be swayed by profit motive to serve the constituents. Transport affects the health and safety of the people. A private operator or body has an eye only on the return on his investment. Want of finance may cripple the service, which may even be closed down abruptly, as happened in Madras recently to the Tram services. The fact that the bus proprietors may be thrown out of employment is doubtless a circumstance but there is nothing to prevent them from operating elsewhere or in a smaller sphere, such for example, in small taxis. Hence it is submitted that the impugned legislation is a reasonable restriction, and that Art. 19 (1) (g) does not invalidate it.

The question then arises whether the enactment offends Art. 31 (2) since no provision has been made therein for the payment of compensation for the superseded bus owners. On this point, their Lordships have held overruling the High Court that the 'taking' had been under Art. 31 (2) and that it became void as no compensation had been fixed. The other view would be that regulation of public transport would be an exercise of police power, which even if it be confined to the categories set out in Art. 31 (5) (b) (iii) would nevertheless be attracted in the present case, because as their Lordships themselves have observed, "under the Motor Vehicles Act, the State controls and regulates for the purpose of ensuring safety, peace, health and good morals of the public." Secondly, even if it be not a variety of police power, it would, it is submitted, come under Art. 31 (5) (a), which removes from its operation the provisions of "any existing law", which as defined in Art. 366 (10) would apply to the Motor Vehicles Act (IV of 1939). In other words, such disabilities as have been imposed on the operators have had their origin and justification in the said Act, which as stated, offers monopoly of transport to none. Hence it is submitted that no compensation need be paid.

Even assuming that Art. 31 (2) would govern the case, the question still remains whether the wording of the Article is of sufficient amplitude to cover cases of this kind. This depends on an appraisal of what exactly were the rights of the owners and how they had been expropriated. *Prima facie*, the Article applies whenever there has been a deprivation coupled with acquisition. Deprivation *per se* is not compensable as in America, and the proprietor has not merely to be deprived but his rights have also to become vested in the State. Of what are the proprietors deprived ? Most certainly, of the right to earn a living by operating motor transport. But looked at more deeply, it is clear that they have been deprived of the right to obtain a permit to ply buses on the particular route. They have not been deprived of their buses and their appurtenances. Their business has not been freezed or taken away lock, stock and barrel, The buses are still there, which may be sold or diverted to other routes, the technical and traffic staff would probably be taken over by the State itself with higher pay and prospects. The residuary right, namely, the right to obtain a permit it is submitted, will not by itself be a right to property, at any rate in the constitutional sense. A right to property is one which is available to the owner against the rest of the world, such as a right to an easement or to receive dividends. But a right to obtain a permit under the Motor Vehicles Act is a nebulous one. It may be granted or refused, or cancelled abruptly : there is no property or priority in it.

Even the good will of a business has been held not to be a property right in the constitutional sense. The passage in Nicol's Eminent Domain,

Vol. II, p. 109, referred to in the judgment of the High Court, is particularly apposite in this context: " When a piece of real estate upon which an established business is carried on, is taken for public use, it often happens that the proprietor of the business is unable to secure an equally available site in the neighbourhood; and by the interruption of his business and the removal of his store to a considerable distance away, he may lose the greater part of his customers and never be able to regain his standing in the business community. If he is the owner of the land taken, the jury may partly compensate him by giving him a liberal award for the land; but if he is a mere tenant, especially if there be an eminent domain clause in the lease, he may not receive a dollar." The "eminent domain clause" in the present instance would be S. 42 (3) of the Motor Vehicles Act and S. 42 (4) as amended in Madras.

"Acquisition" imports anything newly got or obtained, and in the present instance it is submitted that the Government had not got into something which had not been its own already. Since 1939, the Government could possess the right to ply buses of its own. It is not as if it had seized it from the previous operators. In *Dwarkadas Srinivasdas* v. *Sholapur Spinning Mills Company* 67 L.W. 176 the right of management came to be vested in the Government.

Another circumstance may also be adverted to. Supposing the private carriers were to sue the Government for the loss of monopoly, they would not be able to get any liquidated sum as compensation or damages, which could not be assessed with any degree of accuracy. Nor can the right or rather the interest in the permit be attached or seized in execution. In *Veerappa Pillai* v. *Raman and Raman* 65 L W. 620, restitution rights became unenforceable. Hence it is submitted that Art. 31 (2) cannot be invoked in the circumstances of the case.

Their Lordships have adverted to the concept of a welfare State which India is striving to transform itself into. A welfare State has to be vouchsafed police powers with a view to bring about the prosperity and well being of the people. And where a citizen is deprived of property or proprietary rights under such a power the compensation received by him is protection, peace and plenty, and in this instance are efficient and cheap public transport such for example as obtains in Bombay city.

It is finally submitted in conclusion that although theories like the prerogative of the crown or "franchise" as obtain in England and America respectively, may not apply verbatim to conditions in India, still the rule in *Packard* v. *Bentol*, 264 U.S. 144 is a rule of law and equity. In consequence it needs to be held that although a citizen's right to travel and transport property over the public highways, might be conceded, he cannot make them his place of business by using them as a common carrier for hire, unless it is granted as a sort of privilege by the State. The decision of the Madras High Court in *C. S. S. Motor Service* v. *State of Madras* 66 L. W. 85 in so far as it applies to Motor vehicles under Act IV of 1939, is to be read in the light of the pronouncement of their Lordships of the Supreme Court in *Harman Singh* v. *Road Traffic Authority, Calcutta* (1954) I M.L J. 79, the *ratio decidendi* of which will, it is respectfully submitted, govern the present case also.

SUMMARY OF RECENT CASES

11—11—1954. Appeal No. 261 of 1949.

Panchapakesa Ayyar, J.

Somasundaram Chettiar *v.* Sundararaja Iyer.

Partnership—Dissolution—Decree against one of the partners for account, etc.—Death of the defendant pending appeal—Legal representative, how far liable.

Where in a suit for dissolution of a partnership and for accounts, a decree was granted by the trial Court against one of the partners to render an account of the management of the partnership and pending the appeal that defendant died, on the question whether his legal representative could be asked to render the account,

Held: the legal representatives could be made liable only for whatever amount is

found to be liable in the final decree proceedings on the materials placed before the Court and to the extent of deceased defendant's assets in their hands. A. I. R. 1945 Bom. 21 and unreported decision of Horwill and Rajamannar JJ. in C. S. Nos. 589 of 1954 and 157 of 1945 followed.

59 Mad. 461 distinguished.

Decree modified.

Messrs. *R. Kesava Ayyangar* and *K. Parasaran* for Appts.

Messrs. *V. C. Gopalratnan, G. N. Chari, M. Murugappa Chettiar, S. R. Krishnamacharya* and *R. Gopalaswami Ayyangar* for Respts.

V. C. S. ——

24—11—1954. Appeal No. 632 of 1950.

Mack, J.

N. P. S. Arumugham & Co. *v.* Union of India.

Indian Railways Act—Risk Notes A and B—Damage—Extent of liability—Contributory factors to damage—Principles in awarding damages.

It is settled law, in respect of goods consigned through Indian Railways that when they are despatched only under Risk Note B, the obligation on the railway company under it has to be discharged by disclosing to the consignor how the consignment was dealt with throughout the time it was in its possession or control. The procedure to be adopted in such cases has been laid down by the Privy Council in I. L. R. 1937 Bom. 376. Where, however, both risk notes A and B are executed, it has been held in (1953) 1 M. L. J. 258 following the view taken by Meredith J. in A. I. R. 1948 Pat. 45 that it is open to the railway administration to take advantage of either risk note, and if under either it can be shown that the railway administration can escape liability, then the suit against the Railway must be dismissed.

Held : on the facts of the case so far as damage to the consignments of oil as a result of leakage from tins is concerned, the liability of the railway administration has to be governed by risk note A as the tins were accepted for transport in bad condition and liable to damage, leakage or wastage in transit. Therefore before the plaintiffs can succeed, they must show that the loss arose from misconduct on the part of the railway administrations' servants.

With respect to the contention that the main reason for the extensive damage done to this consignment of 660 tins was the abstraction of the six tins at some point in transit which led to the tins knocking against each other during the inevitable shunting and this it was which caused all the damage.

Held : the extraction of six tins as a result of misconduct by railway servants was a contributory of factor to the resulting damage to these tins already liable to leakage and damage. The nice point thus arises as to whether it is in any way possible to estimate the damage to the remaining tins had they not been defectively packed by reason of the abstraction of six tins. In such a case, it would be equitable to attribute half the damage to the consignment, to defective packing and the other half to abstraction of the sixtins as a result of the misconduct of the servants of the railway administration.

1947, Patna 84 and 1949 Patna 119 considered.

Appeal allowed partly.

Mr. *B. V. Viswanatha Ayyar* for Appt.

Mr. *S. S. Ramachandra Ayyar* for Respt.

V. C. S. ——

7—12—1954. Appeal Nos. 185 & 211 of 1951.

Rajamannar C. J., and Rajagopala Iyengar, J.

Karuppaiya Nadar *v.* Special Deputy Collector for Land Acquisition.

Land Acquisition Act, Ss. 25 (2), 9 (i) and 9 (iii)—Appearance of claimant before the Land Acquisition Officer—Knowledge of necessity to make a claim—Failure to make —Subsequent bar from claiming enhanced compensation under S. 25 (2).

Where in pursuance of a notice received under S. 9 (3) of the Land Acquisition Act, the claimant appeared before the officer and promised to produce some documents within a few days and subsequently never turned up and it is common ground that he did not make any oral claim regarding the quantum of compensation, it was contended (i) that there was no proper service of notice under S. 45 as the notice was served only on a servant and (ii) that there was a duty on the officer to inform the claimant that he should make a claim for a particular amount of compensation and that in the absence of any notice or warning, the provisions of S. 25 (2) would not be attracted.

Held : on the facts of the present case, the provisions of S. 25 (2) are attracted and therefore it must be held that the claimant either refused or omitted to make a claim without sufficient cause as provided in S. 25 (2) of the Act. Hence he could not be permitted to claim enhanced compensation at a subsequent stage.

(1953), 2, M. L J. 568 distinguished.

53 Mad. 921 and 57 Cal. 837 referred to.

Appeal dismissed.

Mr. *M. Natesan* for Appt.

The Govt. Pleader and Mr. *V. Srinivasan* for Respt.

V. C. S. ——

10—12—1954. C. R. P. No. 1541 of 1954.

Mack, J.

Pachiyai Pillai, *In re.*

Practice Return of plaint for defects other than deficit Court-fee—Failure to take from the Court—Rejection of plaint, if proper—Restoration—Necessity—C.P.C., O. 7, R. 11, if applicable.

The general procedure in a case where a plaint is returned for some defects other than deficit court-fee for rectification and if not taken by the plaintiff or his Advocate, is that some further time should be given, and if the plaint is rejected it can always be restored to file on a suitable application explaining the delay. There is in fact no provision of law under which a Court has to reject a plaint as in cases under O. 7, R. 11, C. P. C., when the plaint is returned for rectification of defects other than court-fee.

Petition allowed.

Mr. *K. M. Venkatavaradhachariar* for Petr.

V. C. S. ——

10—12—1954. C. R. P. No. 38 of 1953.

Rajagopala Iyengar, J.

Chinna Ammal *v.* Vellai Ammal.

Court Fees Act, S. 7 (iv) (A) and S. 7 (v) —Suit for possession—Plaint allegation that a gift deed was first made—Subsequent arrangement under which defendant agreed to permit the plaintiff to enjoy the properties—Proper court-fee payable — Applicability of S. 7 (v) and inapplicability of S. 7 (iv) (A).

Where a suit was filed to recover possession of properties which were originally the subject of a gift deed in favour of the defendant but the plaintiff alleged that subsequent to the gift deed there was an arrangement under which the defendant agreed not to insist on the gift but to permit the plaintiff to enjoy the properties,

Held: on a proper construction of the plaint, the validity of the gift was not challenged by the plaintiff and the suit was properly stamped under S. 7 (v) and that S. 7 (iv) (A) has no application to the facts.

Petition allowed.

Mr. *S. T. Tyagaraja Ayyar* for Petr.

The Asst. Govt. Pleader and Mr. *P. S. Kailasam* and Miss. *T. A. Bhyme* for Respts.

V. C. S. ——

10—12—1954. S. A. No. 504 of 1952.

Govinda Menon, J.

Satyanathan *v.* Venkata Rama Ayyar.

Transfer of Property Act, S. 100 and Contract Act, S. 221—Charge over immoveable property—Requisites—Oral charge, if valid —Agreement to allow occupation of immoveable property till repayment of loan and other amounts due—Right to remain in possession of the property—Lien of agent against principal—Applicability of S. 221 of the Contract Act.

Where an oral agreement was entered into that the defendant should put the plaintiff in possession of a certain house and the latter was directed to discharge the existing mortgage and continue to remain in possession until the amounts spent by him in redeeming the mortgage and received as loan were returned, and the house was sold subsequently by the defendant to a third party, this suit was brought for recovery of the sums expended by the plaintiff and for a charge over the house as against the third party purchaser,

Held: it is not possible to create a charge in respect of immoveable property orally in view of the amendment to S. 100, T. P. Act after 1929. I. L. R. 1939 Mad. 199 followed. 44 L. W. p. 438=1936 Mad. 865: Not good law.

But the plaintiff is entitled to retain the property until he is paid off the monies expended by him for redeeming the mortgage etc., as an agent under S. 221 of the Indian Contract Act and continue to remain in possession of the property till such time. 51 L. J. Ch. Dn. 199 referred to.

Appeal dismissed.

Messrs. T. *Chengalvarayan* and *M. R. Narayanaswami* for Appt.

Mr. *O. K. Ramalingam* for Respts.

V. C. S. ——

14—12—1954. C. R. P. No. 763 of 1954.

Balakrishna Ayyar, J.

Mehta & Sons *v.* T. Sadasiva Mehta.

Madras Buildings Lease and Rent Control Act (XXV of 1949)—"Rent" what is—Consideration—Nature.

Where a person is permitted to be in the occupation of a building belonging to another, the mere circumstance, that he pays one per cent. of the turnover of his business, instead of a fixed or specified amount, will not by itself alter the character of the payment or the legal relationship between the parties. If otherwise, he is a tenant, (or a sub-lessee as in this case), the fact, that the amount, he is required to pay for its use is to be ascertained in a specified and particular way will not make any difference. The amount paid will still be rent. (1952), 1 M.L.J. 652 considered.

Petition Allowed.

Messrs. *V. C. Gopalaratnam* and *C. P. Rajagopala Ayyagnar* for Petr.

Messrs. *R. Ramamurthi Ayyar* and *K.S. Narayana Ayyar* for Respt.

V. C. S. ——

15—12—1954 W. P. No. 560 of 1954

Balakrishna Ayyar, J.

Viswanathan *v.* Presiding Officer, Revenue Court, Tanjore.

(Madras) Tanjore Tenants and Pannaiyals Protection Act (XIV of 1952)—Powers of a Revenue Court—Review—Absence of provision—C.P.C., if applicable.

A Revenue Court acting under Act XIV of 1952 has no power to review and set aside a decision which it has given on the admission or confession of the opposite party and subsequently to reopen the proceedings on his application and pass an entirely different order, since it cannot be said to be a mere mistake which it has no doubt power to correct in cases of arithmetical or clerical mistakes or errors arising from an accidental slip or omission under its inherent powers. A power to review must be specifically granted and no such power has been conferred on the Revenue Court by Act XIV of 1952. Rr. 4 and 5 of the rules framed under the Act cannot be said to confer such power on the Revenue Court.

Order quashed.

Mr. *T. S. Purushothaman* for Petr.

The Special Govt. Pleader for Respt.

V. C. S. ——

15—12—1954 W. P. No. 701 of 1954.

Rajagopala Iyengar, J.

Panchalai Achi *v.* The Madras State represented by Collector, Tanjore.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), S. 9 (7) —Presumption—Scope of.

Under S. 9 (7) of the Estates Abolition Act a presumption is raised that a grant is not of both the warams and that it is for the person who sets up such a case to prove it by rebutting the presumption. This presumption can be rebutted in one of two ways, namely, that the grant was to a person who on the date of the grant owned only the kudiwaram interest in the land or that the kudiwaram interest was expressly

included in the grant. This statutory provision has to be taken into account in appreciating the evidence afforded by the previous proceedings which might have taken place in relation to the village. If they had proceeded upon a different view of the burden of proof, as they would have naturally, in the absence of a provision corresponding to S. 9 (7) of the Act XXVI of 1948, those decisions cannot be relied upon for the purpose of showing that the presumption has been rebutted.

Where the inam was a Bhatavrithi inam and the original grantees were Brahmins who held the villages in Agraharam, the presumption as to the nature of the grant cannot be drawn as ordinarily speaking Brahmins may not be expected to cultivate the lands themselves and in such circumstances it would not be incorrect to state that the subject of the grant was merely the melwaram interest. 24 M.L J. 655 followed.

Petition dismissed.

Messrs. *V. Vedantachari* and *K. S. Rajagopalachari* for the Petrs.

Mr. *G. R Jagadisan* for Mr. *V. Venkataraman* and *Special Govt. Pleader* for the Respts.

V. C. S. ——

16—12—1954 Crl. R. C. No. 84 of 1954.

Somasundaram, J.

Ramachandra *v.* Rajammal.

Crl. P. C., S. 488—Award of maintenance—Petition for—Legality of marriage questioned by the husband—Form of marriage—Proof—Principles.

Where in an application for maintenance by the wife against her husband belonging to the Arya Vaisya community, evidence was adduced by her to show that on a particular day the marriage between the parties took place and that a purohit officiated and that the husband tied the 'thali' round the neck of the wife, it was contended for the husband that there was no evidence of the rights and ceremonies necessary to constitute a legal marriage in that community and as there was no proof of the performance of such rights and ceremonies, the Court cannot infer a legal marriage.

Held, in view of the evidence that a marriage has in fact been celebrated, the presumption that a valid marriage has taken place must be drawn. The wife would therefore be entitled to an order for maintenance.

13 M. I. A. 141 and (1946) 1 M.L.J. 438 at 440 followed.

28 Cal. 37 referred to.

Petition dismissed.

Mr. *K. V. Venkatasubramaniam* for Mr. *K. Narayanaswami Mudaliar* for the Petr.

Mr. *U. Somasundaram* for the Respts.

The Public Prosecutor for the State.

V. C. S. ——

16—12—1954 C. R. P. No. 979 of 1953.

Rajagopala Iyengar, J.

Ranganathan *v.* Chinna Lakshmi Achi.

C.P.C., S. 151—Court's powers—Compulsion of a person to be examined by a Doctor against her consent—Not permissible.

S. 151, C.P.C., cannot be invoked to enable a Court to pass an order compelling a party to be examined by a doctor against her consent. The Court may draw any adverse inference against a party who refuses to be examined himself or herself but it cannot impose a medical test on a human being, as it is tantamount to treating the human being as a material object which no Court should do under its inherent powers, apart from any statute which may clothe the Court with such power.

Petition dismissed.

Mr. *T. S. Vaidyanatha Ayyar* for Petr.

Messrs. *A. V. Narayanaswami Ayyar* and *R. Venkatachalam* for Respt.

V. C. S. ——

16—12—1954 C. R. P. No. 525 of 1954.

Balakrishna Ayyar, J.

Rajarathnam *v.* Commissioner, Municipal Council, Virudunagar.

District Municipalities Act, S. 50 (1) (a) proviso—Meaning of expressions "due notice" and "given."

It cannot be said that "due notice" under S. 50 (1) (i) of the District Municipalities Act can be "given" only by delivering the notice personally and actually into the hands of the Councillor. Where the Councillor has given written intimation to the office of the Municipality that notices, etc., intended to be served on him may be delivered to certain persons at a particular place, apparently his place of business, and there is evidence in the case that notices relating to the meeting which the Councillor failed to attend and intended for him were actually served on such persons at the address, it must be held that the Muncipality has served the notice properly.

Petition dismissed.

Mr. *M. Natesan* for Petr.

Messrs. *Alladi Kuppuswami* and *P. P. Thangamani* for Respt.

V. C. S. ——

16—12—1954. Crl. R. C. No. 1006 of 1954.
(Crl. R. P. No. 949 of 1954.

Panchapakesa Ayyar, J.

C. T. Devaraja, Proprietor of Jayalakshmi Industries and also of "Vil Ambu", a tamil Weekly—*Petitioner.*

Criminal Trial — Presumption—Question to a witness during trial—If sufficient—Instructions from party to Counsel — If necessary to be proved.

Though it has been held in some cases as in A. I. R. 1954 Mad. 739, that there is a presumption that an Advocate will put questions only on instructions from his client, it is only a slight presumption and is not at all a conclusive presumption, like the one under S. 112 of the Indian Evidence Act. Unless there is corroborative evidence in support of this presumption, it will not be enough to base a conviction on a question put to a witness by a Counsel during a trial under instructions from his client. For convicting a person for a criminal offence while putting a suggestion to a witness, far stronger evidence will be required than such a presumption alone.

Petition Dismissed.

Mr. *N. Panchapagesa Ayyar* for Petr.

V. C. S. ——

New Judges of the Andhra High Court.

We welcome the appointment of three more Judges to the Andhra High Court, viz., Messrs. N.D. Krishna Rao, A. V. Viswanatha Sastri and P. Satyanarayana Rao, the first of them as a permanent Judge of the Andhra High Court and the other two under Art. 224 of the Constitution on the recommendations of the Chief Justice.

Mr. N. D. Krishna Rao who has been elevated from his office as District and Sessions Judge will be the first Judge of the Andhra High Court recruited from the subordinate service. We are sure that his rich experience will enable him to discharge his duties ably.

We extend our congratulations to the Chief Justice of the Andhra High Court in securing for his new High Court the services of two eminent retired Judges of the Madras High Court. It was hoped at the time of the retirement of both Mr. Justice Viswanatha Sastri and Mr. Justice Satyanarayana Rao, that our Government would be coming forward to utilise their services in some sphere or other, sooner than later. In the appointment of Mr. Justice Satyanarayana Rao to the Andhra High Court there is an additional feeling of happiness in everybody that an eminent Andhra Judge of the composite High Court who functioned till almost the inauguration of the new High Court has been now given an opportunity to render his services and his valuable experience and assistance to the High Court of his State.

Mr. Justice Viswanatha Sastri, even during the short period after his retirement in 1951 has played a great part in the toning up of the Income-tax administration of our country as Chairman of the Income-tax Investigation Commission. We are glad that his invaluable guidance will also be available to the infant High Court. The appointment of a retired Madras Judge to act on the Bench of the Andhra High Court will truly represent the blending of the culture of the two States for a long time and the inheritance of the high traditions established by the people of the two States together in their common struggle for the freedom of our country.

In this connection, we also desire to record our feeling of gratification that the Andhra High Court has given a fair representation to the claims of members of the profession for being elevated to the Bench. We have been constantly advocating the policy of recruitment of High Court Judges direct from members of the Bar. This is based on the principle that those in the profession who preferred to continue therein and face the heavy competition and have attained by their own ability and industry a prominent place, make better Judges than others who have not had the same experience. There can be no doubt that with the appointment of these three more Judges, the Andhra High Court will clear off its arrears within the expected period and proceed to start with its work with a clean slate.

The Late Mr. A. Vaidyanatha Iyer,

Advocate, Madurai.

It is with extreme regret that we record the death of Mr. A. Vaidyanatha Iyer, a prominent Advocate of Madura. He was one of the few members of the Bar, who regardless of the consequences, made immense sacrifices by joining in the fight for the Independence of India. It is often said that Law is a jealous mistress but even Law makes exceptions; for in the case of Mr. Vaidyanatha Iyer, he was as much engrossed in politics as he was in his profession and he was successful in both. In politics he shone as a bright star. A man of high integrity and character, loyal to his principles and convictions, he was supreme. He was a strong believer in the uplift of the downtrodden classes, especially Harijans. While others may talk of Harijan uplift, he was a person who in his daily life practised the principles

which he preached. He made no difference between persons; Harijans and other classes received equal treatment in his own household. In fact, but for the courageous and bold step taken by him for the inductment of Harijans into the most important temple of South India, Sri Meenakshi Amman Temple, the Temple Entry measure could not have been so easily and successfully achieved. If in later days he was not as active in politics as before, it is because he was not one who could accommodate himself or bend his principles to the exigencies of time; for, modern politics is very exacting in this respect. He was quick to injustice and very often expressed himself very strongly against injustice or inequality of any kind. In his death, our country has lost a great public servant.

He was a great Parliamentarian. He expressed his views in the Legislative Assembly boldly and fearlessly and often even against the view of his own party men. He was listened to with respect even by his opponents and his absence from the Assembly in later days was a sad loss to the country.

In private life, he was free and generous to the numerous Congress workers who sought his help in those troublous days when Congressmen and workers were treated by the then Government with great severity and very often with violence. He was intensively loyal to his friends and he could be depended upon at any moment and on any occasion to help a friend in distress or difficulty.

One immense service that he has rendered to the profession is that he demonstrated in his own life that a person of character and integrity and of loyalty to his convictions could practise the profession of law and succeed in it. He disproved in his life the common saying that there is no place for an honest man in the profession. Because of his high character, he was respected by the Judges, trusted by his clients and revered by his colleagues. His advocacy was a forcible one born of a conviction of the truth of his client's cause, as he was always careful in selecting his cases. His preparation of the cases was thorough and his presentation clear and convincing. He was not a rich man. What he earned, he gave freely for the cause of the poor and the public. The Editor knows personally that whenever he remained in the jail in the cause of the country, his family had to live on borrowed money and as soon as he was discharged from the prison he would take up to the profession again and clear the debts accumulated during his incarceration.

It is a matter for regret, however, that he chose a mofussil place though important, for his activities as a lawyer. If he had only practised in the Metropolitan City, he would have had a wider field of activity which would have brought him greater name and fame and would have easily attained for him the leadership of the Madras Bar.

May his soul rest in peace!

3—1—1955. Crl. A. No. 451 of 1954.

Panchapakesa Ayyar, J.

The Public Prosecutor *v.* Parthasarathy Ayyangar.

Madras Prevention of Adulteration Act, R. 37 (A) (a)—Prosecution under—Defence of ignorance of the adulterated nature of the article of food—Non-maintainability.

The prevention of Adulteration Act and rules framed thereunder are intended to protect the purchasers of the articles of food from adulteration. Under S. 6 (2) of the Prevention of Adulteration Act, certain conditions have to be fulfilled before an accused could rely on a defence that he had no reason to believe at the time when he sold the food, that it was adulterated. In all such cases therefore, it would be no defence to say merely that the vendor was ignorant of the adulteration of the substance or of its quality.

Appeal allowed.

The Public Prosecutor for Appt.

Mr. *M. Srinivasagopalan* for Mr. *M. R. Narayanaswami* for Respts.

V. C. S. ———

The Madras Indebted Agriculturists (Repayment of Debts) Act, 1955.

ACT No. I OF 1955.

The following Act of the Madras Legislature received the assent of the President on the 27th February 1955 and is hereby published for general information :—

An Act to give relief to indebted agriculturists in the State of Madras.

WHEREAS it is expedient to enable the indebted agriculturists to repay their debts in easy instalments ;

BE it enacted in the Sixth Year of the Republic of India as follows :—

1. *Short title, extent and commencement.*—(1) This Act may be called the Madras Indebted Agriculturists (Repayment of Debts) Act, 1955.

(2) It extends to the whole of the State of Madras.

(3) It shall be deemed to have come into force on the 1st March 1955,

2. *Definitions.*—In this Act, unless the context otherwise requires,—

(*a*) 'agriculturist' means a person who has an interest other than interest as a simple mortgagee in any agricultural or horticultural land not being a land appurtenant to a residential building, but shall not include—

(i) any person liable to pay land revenue (which shall be deemed to include peshkash and quit rent) exceeding one hundred and fifty rupees per annum in any year after 1952-53 ;

(ii) any person assessed to profession tax on income derived from a profession other than agriculture under any law governing municipal or local bodies in India on a half-yearly income of more than nine hundred rupees in any half-year after 1952-53;

(iii) any person assessed in any half-year after 1952-53 to property or house tax on an annual rental value of rupees six hundred in respect of buildings (other than a building in which he lives) or lands other than agricultural lands under any law governing municipal or local bodies in India ;

(iv) any person assessed to sales tax on a total turnover of not less than twenty thousand rupees in any year after 1952-53 under the Madras General Sales Tax Act, 1939 (Madras Act IX of 1939), or under the law of any other State relating to sales tax ;

(v) any person assessed to income-tax under the Indian Income-tax Act, 1922 (Central Act XI of 1922), in any year after 1950-51 ;

(vi) a firm registered under the Indian Partnership Act, 1932 (Central Act IX of 1932), or a company as defined in the Indian Companies Act, 1913 (Central Act VII of 1913), or a corporation formed in pursuance of an Act of Parliament of the United Kingdom or of any special Indian law ;

Explanation I.—Where a joint Hindu family or tarwad, tavazhi, kutumba or kavaru, is an agriculturist, every co-parcener or member of the tarwad, tavazhi, kutumba or kavaru, as the case may be, shall be deemed to be an agriculturist provided that he does not fall under any of the categories specified in sub-clauses (i) to (v).

Explanation II.—The provisions of this Act shall not apply to any person who though an agriculturist was not an agriculturist on the 1st October 1953 ;

(*b*) 'debt' means any liability in cash or kind, whether secured or unsecured, due from an agriculturist on the 1st October 1953 whether payable under a contract or decree or order of a Court, civil or revenue, or otherwise, but shall not include—

(i) any sum payable to the State or the Central Government or to any local authority ;

(ii) any sum payable to any co-operative society including a land mortgage bank, registered or deemed to be registered under the Madras Co-operative Societies Act, 1932 (Madras Act VI of 1932), provided that the right of the society to recover the sum did not arise by reason of an assignment made subsequent to the 1st October 1953;

(iii) any liability arising out of a breach of trust;

(iv) any liability in respect of maintenance;

(v) any liability in respect of wages or remuneration due as salary or otherwise for services rendered; or

(vi) any liability incurred or arising under any Chit Fund Scheme.

Explanation I.—Where a debt has been renewed or included in a fresh document executed after the 1st October 1953 whether by the same debtor or by his heirs, legal representatives or assigns or by any other person acting on his behalf or in his interest or as a result of a partition, in favour of the same creditor or his heirs, legal representatives or assigns or any other person acting on his behalf or in his interest or as a result of a partition, the amount outstanding on the 1st October 1953 and included in the document executed after the 1st October 1953 shall alone be treated as the debt for the purposes of this Act.

Explanation II.—Where a debt has been split up after the 1st October 1953 among the heirs, legal representatives or assigns of a debtor or a creditor or as a result of a partition and fresh documents have been executed in respect of different portions of the debt, each of the different portions shall be a debt for the purposes of this Act.

3. *Bar of suits and applications.*—(1) No suit for recovery of a debt shall be instituted, and no application for execution of a decree in respect of a debt shall be made, against any agriculturist in any civil or revenue Court before the expiry of four months from the commencement of this Act.

Explanation I.—Where a debt is payable by an agriculturist jointly or jointly and severally with a non-agriculturist, no suit or application of the nature mentioned in this sub-section shall be instituted or made either against the non-agriculturist or against the agriculturist before the expiry of the period mentioned in this sub-section.

Explanation II.—For the purpose of this Act, a suit in which a decree in respect of a debt is prayed for shall be deemed to be a suit for the recovery of a debt notwithstanding that other reliefs are prayed for in such suit and a decree shall be deemed to be a decree in respect of a debt notwithstanding that other reliefs are granted in such decree:

Provided that a suit for possession of land shall not be deemed to be a suit for recovery of a debt by reason merely of mesne profits being also prayed for in such suit:

Provided further that nothing contained in this section shall apply to any portion of a decree other than that relating to a debt.

(2) Where a creditor files a suit for recovery of a debt during the period specified in Sub-S. (1) or after the agriculturist has paid or deposited into Court the sums and instalments specified in Sub-S. (1) of S. 4 and during the period when he is so entitled to pay, the Court shall in decreeing the suit direct the plaintiff to bear his own costs and pay the costs of the defendant who is an agriculturist:

Provided that nothing contained in this sub-section shall be a bar to the Court passing any order as to costs as between the plaintiff and other defendants who are not agriculturists.

4 *Payment of debt in instalments.*—(1) Notwithstanding any law, custom, contract, or decree of Court to the contrary an agriculturist shall be entitled to pay within four months of the commencement of this Act the interest due on any debt due by him up to the commencement of this Act and one-eighth of the principal outstanding or one-fourth of the total amount outstanding, whichever is less, and the balance of the debt in three equal annual instalments on or before the 1st July of each of the succeeding three years with the interest due on such instalment up to that date,

Explanation.—In the case of a decree, the amount decreed shall be deemed to be the principal.

(2) Where in respect of a decree for debt passed before the commencement of this Act, a debtor fails to

make any one of the payments specified in sub S. (1) the decree-holder shall be entitled to execute the decree in respect of the instalment which is in default.

(3) In any suit filed after the commencement of this Act, the Court in decreeing the suit shall provide for the immediate payment of such instalment or instalments as would have become due under provisions of sub-S. (1) and the balance in further instalments as specified therein.

(4) Where in any suit for the recovery of a debt pending at the commencement of this Act, the debtor claims to be an agriculturist the Court shall, if the debtor is an agriculturist, pass a decree for immediate payment of such instalment or instalments as would have become payable under the provisions of sub-S. (1) and the balance in further instalments as specified therein.

(5) Nothing contained in this Act shall bar the Court from passing a decree or making an order in an application for execution of the decree under such terms and conditions as may be more favourable to the debtor than those provided for in this section either of its own motion upon a consideration of all the circumstances of the case or upon an agreement between the parties.

(6) Where in any suit to recover a debt or in any application for the execution of a decree therefor the debt is payable by an agriculturist jointly or jointly and severally with a non-agriculturist, the Court shall pass a decree or make an order for the payment of the debt found due from the agriculturist as provided in this section as against the agriculturist and make such provision in the decree or order against the non-agriculturist as the circumstances of the case may warrant.

(7) The provisions of sub S. (1) shall, for purposes of execution, be deemed to be a subsequent order of Court within the meaning of Cl (*b*) of S. 48 of the Code of Civil Procedure, 1908 (Central Act V of 1908).

5. *Deposit of debt into Court.*—(1) An agriculturist may deposit any of the instalments as provided in S. 4 into the Court having jurisdiction to entertain a suit for recovery of the debt or into the Court which passed the decree, as the case may be, and apply to the Court to record part-satisfaction of the debt.

(2) Where any such application is made, the Court shall pass an order recording part-satisfaction of the debt if the amount deposited is the correct amount.

(3) The Court shall dismiss the application—

(*a*) if the applicant is not an agriculturist, or

(*b*) if the liability is not a debt, or

(*c*) if the amount deposited is insufficient and the applicant on being required by the Court to deposit the deficit amount within a time fixed by the Court, fails to do so.

(4) Any agriculturist entitled to make such deposit may, before the date on which any instalment is due, apply to the Court having jurisdiction under sub S. (1) for an extension of time for making the deposit of the whole or any portion of such instalment and the Court may, after notice to the creditor, extend the time for payment of such instalment or part thereof for such period as it thinks fit.

(5) The procedure laid down in the Code of Civil Procedure, 1908 (Central Act V of 1908), for the trial of suits, shall, as far as may be, apply to the applications under this section.

6. *Appeals.*—An appeal shall lie from an order passed by a Court under S. 5, as if such an order relates to the execution, discharge of satisfaction of a decree within the meaning of S. 47 of the Code of Civil Procedure, 1908 (Central Act V of 1908).

7. *Presumption as to transfer of immovable property of the debtor.*—(1) Every transfer of immovable property made by a debtor entitled to the benefits of this Act after the 1st October 1953 and before the complete discharge of his debt, shall, in any suit or other proceeding with respect to such transfer, be presumed, until the contrary is proved, to have been made with intent to defeat or delay the creditors of the transferor.

(2) Where a debtor entitled to the benefits of this Act has allowed, in collusion with another, his immovable property to be sold after the 1st October 1953 through Court with a view to defeat or delay his creditors, the sale shall be voidable at the option of any creditor so defeated or delayed.

8. *Exclusion of time for limitation.*—In computing the period of limitation for a suit for recovery of a debt or an application for the execution of a decree in respect of a debt, the time during which the institution of the suit or the making of the application was barred under S. 3 shall be excluded.

9. *Effect of payment or deposit under S. 4 or S. 5.*—Where a debt is payable by an agriculturist either by himself or jointly or jointly and severally with a non-agriculturist and where the agriculturist makes payment or deposits amount towards that debt as provided for in S. 4 or S. 5, a fresh period of limitation shall be computed from the time when the payment or deposit was made against the agriculturist and non-agriculturist.

10. *Power to make rules.*—(1) The State Government may make rules for carrying out the purposes of this Act.

(2) The rules so made shall be placed on the table of each House of the Legislature as soon as they are published and shall be subject to such modification whether by way of repeal or amendment as the Legislature may make during the session in which they are so laid.

SUMMARY OF RECENT CASES

16—12—1954. C. R. P. No. 379 of 1953.

Rajamannar, C. J.

Muthuswami Raja *v.* Ramalingam Chettiar and others.

Court Fees Act, S. 7 (iv) (c)—Suit for injunction restraining defendant from entering market without paying fees and tolls—Applicability of the provision—Inapplicability of S. 7 (iv) (d) or R. 1 of the rules framed under S. 9 of the Suits Valuation Act.

Where the main prayer in a plaint was for issuing a permanent injuntion restraining the defendants from entering the property, which was being used as a market on market days without payment of fees and other tolls, and the plaintiff valued the suit for purposes of jurisdiction and court-fee at Rs. 3,100 and paid court-fee thereon stating it to be under S. 7 (iv) (d), it was contended that the suit should be valued under R. 1 of the rules framed by the High Court under S. 9 of the Suits Valuation Act.

Held : this is not a case where the plaintiff is seeking any relief to the property on the ground that the defendant denies the title of the plaintiff to the property and disturbs or threatens to disturb the plaintiff's possession thereof. The rule above mentioned has only reference to property, the value of which can be calculated in the manner provided in S. 7 (v) of the Court Fees Act, 1870. A reference to that provision will show that it deals with suits for the possession of lands, houses and gardens. It has no reference to intangible interests in immovable property like the right to collect fees. Though the prayer is simpliciter for an injunction, on a reading of the plaint it is clear that what the petitioner wants is really a declaration of his right to charge fees and an injunction which is in the nature of a consequential relief. The relief sought by the plaintiff is with reference to immovable property. Therefore the suit should be valued under S. 7 (iv) (c) of the Court Fees Act read with the proviso inserted by the Madras Amending Act of 1922.

Order modified.

Mr. *P. S. Chandrasekhara Ayyar* for Petr.

Mr. *S. Ramachandra Ayyar* for Respt.

V. C. S.

BAR COUNCIL ELECTION, 1955.

(Communique received from the Madras State Bar Federation for favour of publication)

Nominations to the Bar Council Elections have been called for, and it is expected that there may be a keen competition. In this connection, the Executive Committee of the Bar Federation desires to bring to the notice of the electorate that in the recent elections to the Andhra Bar Council, election petitions have been filed alleging illegalities and irregularities on the part of the electorate and the candidates, which cannot be said to redound to the credit, dignity and prestige of the Bar. Such complaints were made here even on the occasion of the last elections in 1950. The Committee therefore thinks it its duty to give a lead in the matter of the exercise of the franchise. It is not the purpose of the Committee to support or advance the candidature of any person whatsoever, but it only wishes to remind the members of the Bar of their privileges and duties at the present moment. Though it is necessary on the part of the candidates that they, in soliciting votes, should state their claims for support to the electorate, any aggressive or vigorous canvassing bringing undue pressure upon the the voters is wholly unnecessary in the case of such an enlightened electorate as the members of the Bar; nor is it necessary to remind the voters that they should strictly conform to the rules of the Elections and even be overstrict in their observance.

In the nature of things the Committee cannot lay down and does not think it proper to lay down any set rules for guidance, and hence the Committee refrains from doing so. At the same time, the Committee feels it its duty to point out that the elections to the Bar Council should be free and uninfluenced by extraneous considerations. The voters should exercise their own individual judgment in the marking of the votes; they should not leave this important task to others or to the candidates. They must themselves mark the ballot papers, after marking the votes, either despatch the voting paper individually as required by the rules to the Bar Council Office direct by Registered post or arrange to deposit the same in the box kept in the Bar Council through a trusted messenger. A little trouble and expense in the matter is not too much in the interests of the fair name of the Bar. No room should be afforded for even allegations or imputations of any kind against the members of our profession. It is in this spirit this communique is issued and the Committee hopes that it will be taken in the right spirit.

S. Padmanabhan
(*Assistant Secretary*)

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Apportionment of Compensation under Section 30, Land Acquisition Act.

By A. S. KUPPUSWAMI, *Advocate, Tirunelveli.*

1. Section 30, Land Acquisition Act confers a discretionary power on the Acquisition Collector to refer disputed claims for the apportionment of compensation to the Court for its decision without deciding them himself in his award under S. 11. What is the legal result of such a reference to the Court? The issue requires clarification.

2. Section 30 runs as follows:— "Where the amount of compensation has been settled under S. 11, if any dispute arises as to the apportionment of the same, or as to the persons to whom the same is payable, the Collector may refer such dispute to the decision of the Court." The Collector who proceeds under S. 30, does not give any decision of his own

on the issue of apportionment. Such a decision is necessary, on the other hand, under S. 11. The award under that section has to embody the statutory decision in respect of three matters—viz., (1) the area of the land (2) the total compensation to be allowed for the land and (3) the apportionment of compensation among the several persons interested in the land. The Collector's award under S. 11 is thus incomplete where the Collector makes his reference under S. 30. What is the legal value of such an incomplete award ? The passing of a complete lawful award under S. 11 is followed by the Collector's taking possession of the land under S. 16 which thereupon vests in the Government. S. 16 provides that "Where the Collector has made an award under S. 11, he may take possession which shall thereupon vest absolutely in the Government free of all encumbrances." When there is no lawful award under S. 11, the Collector cannot take possession of the land and the title also will not in consequence vest in the Government. Full compliance with the provisions of the Land Acquisition Act is necessary for possession to be taken and the title to vest in the Government, *vide* 18 Cal. 99 P. C., and 41 Bom. 291 at page 297 P. C. The Court's decision on the issue of apportionment has to be embodied in the Award, before the Collector can take possession.

3. If, however, the Collector himself decides the issue of apportionment and embodies the same in the award without making a reference to the Court under S. 30, he can straightaway take possession of the land under S. 16 which will thereupon vest in the Government, free of all encumbrances. He can also pay the compensation amount to the awardees who can receive the same immediately under S. 31, unless they desire a judicial decision on the issue of apportionment.

4. Thus the necessary implication and resulting consequence of a reference to the Court under S. 30 of the Land Acquisition Act on the issue of apportionment of the compensation is two-fold; Firstly, the Collector cannot take lawful possession of the land until after the Court's decision is given on the issue of apportionment. This will normally entail a delay of one to two years. This delay may be seriously prejudicial to the object of the Acquisition. It has necessarily to be avoided on administrative grounds. Secondly, the claimants for the apportionment can immediately draw their respective amounts under the Collector's award, unless they desire to have a decision of Court. A reference under S. 30 deprives the claimants of this benefit.

5. In view of these resulting consequences under S. 30, it is not advisable for Aquisition Collectors to proceed under the same. The concerned Union and State Governments may issue necessary executive instructions to that effect.

SUMMARY OF RECENT CASES

29—10—1954. Application No. 3868 of 1954. in C. S. No. 416 of 1950.

Ramaswami, J.

Vaduvambal Ammal *v.* Varadarajulu Chetty.

Succession Act—Grant of probate—Scope of the enquiry—Hindu Law—Family custom—Characteristics—Adoption of married man—If valid — C. P. C. O. 22, R. 9—Setting aside abatement—When permissible—T. P. Act, S. 6 (dd) — Right to maintenance—Cause of action, If will survive on legal representative.

The object of a proceeding for probate is to determine the question of representation of the deceased for the purpose of administering the estate and not to determine the question of inheritence.

In order to make a family custom binding on the member of a particular family it must be proved to be immemorial or ancient, uniform, invariable, continuous, certain, notorious, reasonable (or not unreasonable) peaceable, obligatory, and it must not be immoral or opposed to an express enactment or public policy. The two most essential characteristics of a valid cus-

tom are that it must have been in existence actually or presumptively from time immemorial and it must be confined to a particular family, class, sect or locality. The burden of proving a custom opposed to the general law or in derogation of ordinary rights of another, lies heavily on the person alleging it.

O. 22, R. 9, C.P.C., applies only to those cases where the abatement takes place because no application to bring on record the legal representative was made within the prescribed time. The rule thus contemplates an application by a person who had never applied before to be made a legal representative and not one by a person who had applied within time and whose application was rejected. Where the petitioner was once held as not entitled to be brought on record, which is a formal adjudication and he did not appeal against the order, it is not open to the applicant to circumvent it, by the device of filing a fresh application for setting aside the abatement.

Under the general Hindu Law, except in cases governed by the Mayukha, a married man cannot be adopted. Even among Sudras, adoption of one after his marriage is invalid.

The word "maintenance" means the right of a person to receive from another, boarding, lodging, clothing and other necessaries of life; it imports only a personal right to be maintained and a personal enjoyment of the right. Where the maintenance claim in a suit was nothing more than a bare incorporeal personal right of future maintenance and it was not ascertained by agreement of parties or by a decree of Court and has crystallised into arrears, the cause of action in such a suit for the grant of an enhanced maintenance does not survive on the death of the plaintiff. *Actio personalis moritur cum persona.*

Mr. *V. S. Rangachari* for Petr.

Mr. *P. Krishnamachariar* for Respts.

V. C. S. ——

17—12—1954. Crl. App. 123 of 1954.

Mack, J.

Public Prosecutor *v.* D. A. Smith.

Criminal Trial—Traps in investigation of crimes—Permissibility—Necessity for care—Proper method—Undesirability of Judicial Officers collaborating.

In the investigation of crimes, a trap is, of course, quite legitimate and where an official demands a bribe from a person, the latter is perfectly entitled, to report such a demand to higher authorities. Very often, the only way in which a bribe-taker can be brought to book is by a trap. The greatest care, however, has to be taken as regards the passage of money into the possession of the alleged bribe-taker, and it is not sufficient for the prosecution to show that the money which was intended by the organisers of the trap to be paid to the suspect, should be merely found on his table or in his room. Marked notes could easily be planted on a person by dropping them in his office room or putting them on his table. The greatest care must be exercised in the crucial stage where proof in order to warrant a conviction becomes necessary, of a voluntary receipt of a money by the suspect intending to receive it as an illegal gratification.

It is very undesirable and improper that a judicial Magistrate should collaborate with the police in a trap of this kind and draw up documents regarding what various persons said to him in the presence of police officers at the various stages. The association of judicial officers in investigations of this kind has been deprecated in many judgments though there can of course be no objection at all to a judicial officer, a District Judge, a Magistrate or even a High Court Judge, setting a trap of this kind on reliable information in the discharge of his purely administrative responsibility for ensuring to the best of his ability that bribery and corruption are eliminated in his own administrative office. In such a case, he would be acting purely in an administrative capacity. But the harness of judicial officers into police investigations to make admissible in evidence what would otherwise be inadmissible as evidence in law, such as the varying statements alleged to have been made in this case before a police officer, should on no account be permissible.

A trap of this kind should never be set and carried out in the presence of a police officer below the rank of a Dy. Superintendent of Police, the satisfactory superintendence of a trap of this kind requiring a sense of responsibility of a very high order.

Appeal Dismissed.

The Public Prosecutor for Appt.

Messrs. *K. Narayanaswami Mudaliar* and *T. Sundaram* for Respt.

V. C. S. ——

4—2—1955 S. A. No. 289 of 1951

Govinda Menon, J.

Minors Pechi etc. *v.* Perumal Thevan and others.

Mortgage—Usufructuary mortgage—Sale by Government under Revenue Recovery Act—Mortgagee not liable to pay for other lands comprised in one patta—Suit for redemption by mortgagor—Title of owner extinguished.

Where on account of the default of a usufructuary mortgagee in paying the Government Revenue on lands other than the one mortgaged but comprised in one patta, the entire right was sold by the Government under the Revenue Recovery Act and purchased by the mortgagee, no title remains in the owner of the property after that sale.

1930 M.W.N. 993 : Followed.

27 M.L.J. 295 : 34 M 498 ; Distinguished.

Mr. *T. S. Vaidyanatha Iyer* for Appt.

Mr. *K. Desikachari* for Respts.

V. C. S ——

11—2—1955. Crl. R. C. No. 952 of 1954.

Balakrishna Iyer, J.

Noor Mohammed Rowther *v.* Accused.

Madras General Sales Tax Act, S. 15 (b) —Conviction by a Magistrate—Levy of fine and direction for recovery of tax—Tender of the fine by the accused with prayer for time to pay the tax—Appropriation towards tax due—Not permissible.

Where an accused person convicted by a Magistrate under S. 15 (b) of the Madras General Sales Tax Act, was fined and also required to pay the amount of tax due, and he tendered the amount of fine levied along with a memorandum making it clear that the payment was in respect of the fine, and prayed for a month's time to pay the tax, it is not permissible to credit the amount tendered towards the tax due from him.

Mr. *L. V. Krishnaswami Iyer* for the Accused.

Public Prosecutor for the State.

V. C. S. ——

14—2—1955. T. R. C. No. 132 of 1953.

Rajagopalan and Rajagopala Ayyangar, JJ.

State of Madras *v.* Deputy Commissioner of Commercial Taxes.

Madras General Sales Tax Act, Turnover and Assessment Rules, Rr. 4 (2) (d) and 16 (2)—Untanned hides and skins—Commission Agent—Whether liable to tax.

Under R. 16 (2) of the Turnover and Assessment Rules tax may be levied in respect of untanned hides and skins only on the gross purchase turnover. Where the assessee is a licenced dealer in untanned hides and skins which were exported outside the state within the meaning of R. 4 (2) (d) and is merely a commission agent and has not made any purchase, there is no purchase turnover liable to tax under R. 16 (2). If a case falls with R. 4 (2) of the Act, it is exempted from the operation of R. 4 (1).

The Asst. Govt. Pleader for Petr.

Mr. *K. Venugopala Ayyangar* for Respt.

V. C. S. ——

Enhancement of the Jursidiction of the City Civil Court.

We invite the attention of our readers to the Bill introduced in our State legislature to amend the Madras City Civil Court Act. It may be noticed that the bill proposes to give power to the State Government to enhance the jurisdiction of the City Civil Court to try suits of civil nature not exceeding Rs. 50,000 in value. By the proposed amendment to S. 4, the City Civil Court is to consist of a Principal Judge and a number of assistant Judges who are to be under the Principal Judge. The Principal Judge will arrange for the distribution of work among the various Judges. By amendment of S. 15, some important changes are sought to be introduced regarding appeals from the judgments of the City Civil Court. It is provided that in respect of suits of the value of less than Rs. 5,000, an appeal shall lie to the Principal Judge and a further second appeal is provided for to the High Court from the judgment of the Principal Judge. To this extent, it may be said that the provisions applicable to the mofussil is sought to be reproduced to the suits filed in the Madras City Civil Courts. One curious departure to be noticed is that in respect of appeals preferred to the Principal Judge, he is authorised to transfer such appeals to the Court of any Additional Judge and to withdraw such appeals to himself. This to some extent, varies from the procedure applicable to appeals in the District Courts, of the value of more than Rs. 3,000 and less than Rs. 5,000 where such cases have to be disposed the of by District Judge himself. There is this anomaly that may arise, that is, that a suit less than Rs. 5,000 in value tried by an Additional Judge may on appeal come by transfer, before an Additional Judge who is inferior in grade to the trial Judge. That must be provided against. It is much better if this power of transfer is omitted altogether, or better still if the appeal may be heard by a Bench of two Judges one of whom will be the Principal Judge.

The question of the abolition of the Original Side of the High Court has also been under consideration for a long time and the change over is a very important one, as it affects a large number of clientele in the Madras city where commercial, trade, and industrial interests are largely involved. We therefore think that the change contemplated should not have been undertaken unless after it is duly published and the opinions of the various bodies concerned in the matter, ascertained. It is a matter of common knowledge that in the past, when similar steps were contemplated, the members of the legal profession and the various bodies representing Commerce, Industry and Trade used to be consulted and their views ascertained and as a result of the consistent view taken by all of them that the Original Side of the High Court should not be abolished, or its jurisdiction modified in any manner or any extent, the reasons put forward in support of such a view were found sufficiently satisfactory not only by the Government, but also by their Lordships of the High Court, to give up for quite a long time, the idea of abolishing the Original Side, and later on, to limit the extension of the jurisdiction of the City Civil Court only upto Rs. 10,000 and not more.

The only ground which has prompted this additional increase of jurisdiction is stated to be that there should be no difference between the mofussil and the Madras City with regard to the mode or agency of disposal of original civil litigation. In this connection, we beg leave to repeat what has already been stated many a time that it cannot be forgotten that there is a vital difference between;

(1) the classes of litigation that come up on the Original Side and those that come up in the mofussil Courts, and

(2) the Procedure and the general tone and atmosphere of the Courts on the Original Side and the procedure, tone and atmosphere prevailing in the mofussil Courts.

If there is a justification for a differentiation between metropolis and the other places in the State in regard to other matters, there can be no objection to such a distinction being observed and continued, especially as it has been there for nearly a century and more. The Original Side, a separate division of the High Court, has been provided in the three Presidency Towns of Calcutta, Madras and Bombay, for the reasons that the greater part of litigation coming up there, being Commercial and other types of suits require to be dealt with under procedure, specially evoled for them by the Supreme Court of England and found peculiarly fit. It has all along been a peculiar advantage of the Original Side of the High Court in regard to suits coming up for final disposal that they are taken up and heard from day to day without a break, and evidence recorded therein in the direct form in shorthand, so as to save time and trouble. These two great advantages are not available in the system at present prevailing in the mofussil and the City Civil Courts where the continuity of hearing is poor and the time available for hearing and disposal is restricted considerably by the daily disposal by the Judge of Interlocutory, Execution and other Miscellaneous matters.

It is a matter well recognised and admitted and well within the experience of the Hon'ble Judges themselves that the preparation of the suits on the Original Side for the hearing of the suits and the various preliminary steps taken to focus the decision of the Court on the main points by clarifying processes available under the Original Side Rules, is definitely more efficient and helpful to the Court and to the legal profession than in the mofussil and the City Civil Courts.

With regard to the question of delay, the speed of disposal in the mofussil and the City Civil Courts is not in any way higher than in the Original Side of the High Court. On the other hand, it is well within the knowledge of everybody that in the City Civil Courts, in spite of the increase of the strength of the Bench from one to five, the rate of disposal has not increased in any marked measure, but on the other hand, may even be said to have slowed down.

It used to be the strongest argument in favour of abolition of the Original Side of the High Court that the litigants in the City are treated in a preferential manner in that the Institution Fee is considerably less there, than in the mofussil and the City Civil Courts, to which the Court Fees Act applies. This objection has been completely met and removed from 1950, by introducing uniform application of the Court Fees Act in regard to Institution Fees throughout the State including the Original Side of the High Court. Not only from this point of view, but also from the point of view of expenditure by the State, it may be stated that no case is made out in favour of the change; if anything, the change would involve a higher expenditure by reason of at least 4 or 5 more additional Judges having to be appointed to the City Civil Court to cope with the heavy litigation which will be diverted from the original Side by reason of the proposed step.

In addition to the above considerations, there is the fact that the Original Side Bar has been as old as that of the High Court itself and its traditions and record are considerable and weighty. This has been recognised time and again both by the Bench of our High Court and the public and due praise and tributes have been paid thereto from time to time. The strength of the Original Side Bar has been growing much faster than on the other sides of the High Court, so rapidly that at present it may be stated that it is almost as strong as that of the Appellate Side. The most important feature on this aspect is that a very large number of the younger members of the Bar practising on the Original Side are able to work in the better atmosphere there and get an opportunity to acquaint themselves with and follow the noble traditions of the Original Side of the High Court. The change will only mean the deprivation for some people without cor-

reponding benefit to anybody else. It is also a matter which cannot be denied or doubted that the Original Side of the High Court has always been a far better training ground in Advocacy and professional etiquette than the other Courts and has produced almost as many distinguished members to the Bench of our High Court from among the ranks of its practitioners as the other divisions of the High Court.

We would like to quote here the very illuminating words of Sir Philips Hudson, Ex-Member of the Viceroy's Executive Council, when he was informed of an apprehension that the establishment of a City Civil Court would lead in course of time to the total abolition of the Original Side. To this objection, he said as follows:

> "whether we have regard to the efficiency of the Judges themselves, the maintenance of a good Bar, the impartial administration of justice for the protection of the people at large or to any other of the objects which a good executive Government must always keep in view, I am very decidedly of opinion that the substantial maintenance of the Original Side of the High Court is a matter of supreme inportance".

It is submitted that the ready reference usually made to the fact of the Subordinate Judges in the mofussil exercising unlimited jurisdiction and the desirability of bringing the City Civil Courts on a par with them, is a misleading one. Firstly, such a serious step and toning down an efficient institution and bringing in down to a level of the other prevailing institutions ought not to be the predominating reason for the step. The bringing about of a uniformity and the doing away with the preferential treatment can be achieved more by levelling up than by levelling down and not by depriving a large body of litigants of the advantages and benefits that they have enjoyed for over a century. On the facts and figures available, we are informed that the present contemplated step of increasing the pecuniary jurisdiction of the City Civil Courts to R. 50,000 or even Rs. 25,000 would result in the transfer of over 75 to 80% of the suits now pending and being filed on the Original Side, to those Courts and the Original Side of the High Court will be existing only more or less in name. If the reasons which impelled the Government and the High Court in the past to abstain from taking the contemplated step were substantial and sound, they cannot be stated to have been satisfied, if the proposed action would result in the deprivation of the core and the retention of the shell, and a mere nominal result achieved. We, therefore, feel that there are no reasons for introducing the proposed legislation enhancing the juridiction of the City Civil Court which is bound to affect a large section of the litigant public.

SUMMARY OF RECENT CASES

15—2—1955. S. A. No. 1959 of 1946.

Govinda Menon, J.

Periya Valliappa Chettiar *v.* Annamalai Chetty.

Limitation Act, S. 20—Payment on account of a debt—Saving as an acknowledgment—Endorsement by mortgagor—How far binding on a purchaser from him.

Where a mortgage was executed in 1918 in respect of certain property and subsequently in execution of a money decree against the joint family the mortgagor and his joint family one of the items was sold in Court auction and purchased by the decree holder therein and this suit was brought in 1942 by the mortgagee to enforce the mortgage relying on a registered endorsement of payment in 1930 as saving limitation,

Held, the suit would not be barred and the endorsement would save limitation in the circumstances of the case.

Under S. 20 (1) of the Limitation Act, where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his duly authorised agent, a fresh period

of limitation shall be computed from the time when the payment was made. A person making a payment and an endorsement to that effect in the case of a mortgage would be a person liable to pay the debt within the meaning of the section if 12 years have not elapsed from the date of the execution of the mortgage in which case, a suit for sale of the properties brought on that date would not have got barred. Either the personal liability or the property liability must remain with person making the payment. If he has disposed of all his interest in the property but the personal liability remains and the payment is made within six years, then the suit is not barred. If on the other hand, the personal liability is barred, but at least part of the mortgage property remains with the mortgagor or his assignees then the payment made by such person would bind the person on whom the other properties have devolved. If a purchaser by making a payment can keep the mortgage debt alive as against other items of properties, it is all the more reasonable that the original mortgagor himself by making the payment can keep it up. The principle is that so long as the mortgagor has not parted with his interest in the mortgage properties and continues to be liable under the mortgage he can make a payment which will serve under S. 20 of the Limitation Act to start a fresh period of limitation. Case-law considered.

Messrs. *N. C. Vijayaraghavachari* and *N. C. Srinivasan* for Appt.

Messrs. *D. Ramaswami Ayyangar, P. S. Srinivasa Desikan* and *P. R. Varadarajan* for Respts.

V. C. S. ——

17—2—1955 A. S. No. 241 of 1951.

Rajagopalan, J.

Rukmini Shadthi *v.* Venkappa Horwa.

Malabar Law—Aliyasanthana family—Construction of deed—Partition or family arrangement—Principles.

Whether a given transaction in an Aliyasanthana family is a partition or whether it amounts only to an arrangement for the maintenance of the members of that family has to be decided parimarily with reference to all the recitals of the document itself, and the attendant circumstances if any. There can be no formula of universal application to construe the scope of such documents. Though the nomenclature of the document is not conclusive as proof of the nature of the transaction, still in gathering the intention of the parties to the transaction, the name they gave to that transaction will be of considerable significance. Where in the document itself the parties drew a distinction between that document, which was styled a *Vibhaga patra* and the documeuts that preceded it in previous years which were called *tahakarar* and which provided for the maintenance of the members of the family, the very distinction that the parties drew in giving the names to the respective documents should be of considerable assistance in construing the scope of the disputed document with reference to what the parties intended.

Mr. *K. Srinivasa Rao* for Appts.

Messrs. *S. Ramayya Nayak* and *C. S. Vidyasankaran* for Respts.

V. C. S. ——

18—2—1955. W. P. Nos. 449 and 450 of 1952.

Rajagopalan, J.

Sivasubramania Goundar *v.* State of Madras.

Indian Arms Act, S. 18 (a)— Cancellation of a licence — Opportuity to the holder of the licence— Failure to give — Irregularity of the cancellation.

The scheme of the Indian Arms Act and the rules framed thereunder mark a distinction between the case of a grant or a renewal of a licence, on one hand, and a cancellation, on the other. While R. 43 of the Rules specifically vests a discretion in the authority to grant or to renew or to refuse to grant or renew a licence and there is no statutory requirement there that any reasons should be recorded in writing for the cancellation of a licence already granted, specific statutory provision is made by S. 18 (a) and among other things required, reasons should be recorded in writing before the licence is cancelled. That by itself would imply that the licencee should have an opportunity to show cause against the cancellation because the reasons contemplated by S. 18 (a) could not all be one-sided without any reference to what the licencee will have to say.

Mr. *M. K. Nambiar* for Petr.

The Special Govt. Pleader for Respt.

S. C. V. ——

1—3—1955. C. R. P. No. 2060 of 1952

Mack, J.

Parroorayil Mamu *v.* Kuhinon.

C. P. C., O. 9, R. 4 — Scope— S. 151 — Powers of High Court in revision.

Where on the refusal of an application for adjournment the advocate reported no instructions and the suit was dismissed for default and subsequently an application was filed to restore the suit to file to which objection was taken that it was not properly presented as no fresh vakalat was filed and when the fresh vakalat was later on filed it was contended to be barred as having been filed beyond 30 days ;

Held, the decision of the lower appellate Court holding that it was properly presented was not liable to be interfered with in revision under S. 115, C. P. C.,

Order 3, R. 4, C. P. C., is primarily intended to protect clients from anybody other than advocates authorised by them appearing, acting and making representations on their behalf and it certainly was not intended to penalize clients who had in fact instructed an advocate at one stage of the litigation and immediately ratified his authority after he reported no instructions when his failure to file a fresh vakalat was brought to notice. 71 M. L. J. 604 : (1950) 2 M. L. J. 256 : Considered.

Messrs. *N. Sundara Ayyar* and *V. R. Venkatakrishnan* for Petr.

Mr. *K. P. Ramakrishna Ayyar* for Respt.

V. C. S. ——

PROTECTION FOR "JUDICIAL REVIEW" UNDER THE INDIAN CONSTITUTION.

BY

C. S. SUBRAMANIA IYER, *Advocate, Madras.*

The protection given to the power of judicial review as enunciated in the famous case of "*Marbury* v. *Madison*" (1803) 1 Cr. 127 by Chief Justice Marshall, in the Constitution of the United States of America, has been embodied in the Indian Constitution also and it will be found that the foundations of such protection have been deeply laid in the Preamble to the Indian Constitution, as well as in Parts III and IV of the Indian Constitution, which explain and work out the intention expressed in the Preamble, namely, to secure to all its citizens, justice, social, economic and political, and not merely to secure *rights.* The intention is to establish justice in the same way as the Preamble to the Constitution of United States of America declares to establish, between citizen and citizen, citizen and the State, State and State, and citizen and the Union Government:—which means in essence, provision for judicial consideration and determination of *rights* propounded on either side through the forum of a central Supreme Court super-imposed over a number of subordinate High Courts, etc., Justice that is thereby assured to the citizen by the Constitution is meted out in two forms; (a) Firstly as "any law," which "the State" cannot make in depriving the citizen of certain well defined rights styled as fundamental rights, and which he can enforce in Courts by appropriate writs or otherwise; (b) Secondly, as a fundamental right which the State has to embody in framing its laws, though the rights so embodied, cannot be specifically enforced in Courts (Directive Principles of State policy in Chapter IV).

Full liberty for the citizen to introduce legislation to achieve these social objectives is provided in the Indian Constitution, but provision has equally been made to see that a proper balance is kept up between individual rights and social control. Such a safeguard is intended to be effectively prescribed by Art. 50 of the Constitution, which provides for the separation of the Executive from the Judiciary in the service of the State, which in essence means, that it is the ideal and intention of the Constitution to have these two powers separated and placed in two different persons. The Constitution thereby declares, that one of the chief objectives of the Indian Welfare State is to keep the power of judicial review intact, and untrammelled by the encroachments of legislative and executive authorities. It must be understood, that whatever social legislation may be passed through the Legislature, it may ultimately lead to a concentration of arbitrary power in the hands of a select few, who have been delegated and empowered to enforce such legislation, and this delegated legislative power may in the result make the executive arbitrary and despotic; and it is to prevent this catastrophe that Art. 50 has been embodied as a Directive Principle of State Policy under Chapter IV of the Indian Constitution.

Anothor safegaurd against the exercise of executive arbitrariness, which may arise due to the prevailing tendency of legislatures to provide for ousting the jurisdiction of the Courts in pieces of social legislation, is the provision under Art. 200 of the Indian Constitution, "that the Governor shall not assent to, but shall reserve for the consideration of the President, any bill which in the opinion of the Governor, would, if it becomes law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill."

The object of this provision is to secure the right of judicial review especially in important matters affecting the liberty of the people, and to

see that the jurisdiction of the High Court is not ousted to such an extent as to make the High Court become a non-entity or a second arm of arbitrary executive authority. The significance of this provision is that the President may even refuse to assent to a bill which really endangers the prestige and position of the High Court. In this connection, I am reminded of the commentary of Mr. Basu on the Constitution of India, who says, that "if any bill is passed by the legislature which is in direct contravention of any of the *Directives*, the President or the Governor may refuse to give his assent." Surely the above observation will apply to a case of legislation which impairs the prestige and position of the High Court according to Arts. 50 and 200 of the Indian Constitution.

On an analysis of this subject, we find that though there has not been a separation of powers in the Indian Constitution as in the United States of America, which invested the Supreme Court with full judicial authority, yet Chap. IV of Part V of the Constitution under which the Supreme Court derives its powers, is replete with the idea of enlargement of the jurisdiction of the Supreme Court, and thereby is far from contemplating any reduction of its powers of judicial review.

By Art. 71 of the Constitution, the Supreme Court is to have the final authority to decide doubts and disputes regarding the election of the President and Vice-President, and the Supreme Court is a Court of Record, having all the powers of such a Court including the power to punish for contempt of itself ; and it has original jurisdiction and also appellate.

Thus the protection given to the High Court under Art. 200 in order to save its prestige and dignity and to enable it to enforce the fundamental rights of the citizens so well secured by Arts. 13 to 35, by leaving the responsibility on the President to safeguard such rights of judicial review by High Courts, has indirectly been provided also under Arts. 132 and 133 which confer appellate jurisdiction to the Supreme Court from the judgments of the High Courts, and the President of India has indirectly to safeguard the prestige and position of the Supreme Court in the matter of judicial review by such appeals.

Article 138 of the Constitution onwards, provide for enlargement of the jurisdiction of the Supreme Court, and Art. 140 provides for the enlargement of ancillary powers of the Supreme Court. Art. 141 clearly says that the law declared by the Supreme Court shall be binding on all Courts in India. *Art. 144 clearly casts a duty on the President to act in aid of the Supreme Court* as all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. The President of India subscribes to an oath that he will to the best of his ability, preserve, protect, and defend the Constitution and the law, and he will devote himself to the service and well-being of the people of India so that he may not be guilty of violating the Constitution under Art. 61.

The responsibility of defending and protecting the Constitution and the law is the responsibility of maintaining the law declared by the Supreme Court under Art. 141, and all that is meant by the Rule of Law as opposed to arbitrary executive authority.

The Constitution and the law is of course subject to whatever interpretations that may be put upon the Constitution by the Supreme Court, and whatever amendments that may be lawfully and validly made to the Constitution also. But where the President's duty to defend the Constitution and the law comes into conflict with his duty under Art. 144 to act in aid of the Supreme Court, that is to carry out and enforce the judgments of the Supreme Court, the matter at once becomes one of such a nature and of such public importance that it is a question of law or fact of such importance that it is expedient to obtain the opinion of the Supreme

Court upon it under Art. 143 of the Constitution. Thus the matter becomes one of the legitimate duties of the President which cannot be said to be merely discretionary.

Take for example the question of compensation under Art. 31 of the Indian Constitution. The Supreme Court by a number of judgments has interpreted compensation to mean just compensation, and that wherever regulatory exercise of power does not amount to deprivation of property, there need be no compensation but where regulation is excessive, arbitrary and unreasonable it must be deemed to be deprivation, for which the State is bound to give full compensation under Art. 31.

The President of India has a duty to act in aid of the Supreme Court under Art. 144 in order to give permanence to such judgments, and to enforce them. But the Congress Party has announced the Socialistic pattern of Society as the goal of Indian freedom, and has chosen to bring an amendment to the Constitution by making compensation non-justiciable in Courts including the Supreme Court of India and defining compensation to be what is declared by the legislature to be, and not as Courts would interpret it.

The President of India has also the duty, first to see whether the said amendment is in conformity with the principles of the Constitution and whether in accepting such an amendment, he can justify himself as really defending the Constitution and the law i.e., including law declared by the Supreme Court in regard to compensation. Even considering that the proposed amendment to Art. 31 of the Constitution will come under the definition of "Constitution and the law", is it not in conflict with his duty to act in aid of the Supreme Court under Art. 144, as the very object of the proposed amendment to Art. 31 of the Constitution is to *avoid* and not to *aid* the judgment of Supreme Court in regard to compensation.

In such a case, therefore, two questions arise for the President to consider, one is, is the proposed amendment to the Constitution valid and Constitutional—Constitutional in the sense that he will be deemed to protect the Constitution and the law if he ratifies the amendment? Will he be said to devoting himself to the service and the well-being of the people of India as a whole, and not to members of any particular party alone? (2) Is the ratification of the proposed amendment by him, consistent with duties to act in aid of the Supreme Court under Art. 144, and the protection to judicial review given under Art. 50, Art. 200 and Arts. 132 and 133 of the Constitution of India? Thus these two questions are of such great importance, that the President has the duty to consult the Supreme Court under Art. 143 before ratifying the amendment. The object of the directive in Art. 143 is not merely directory but in a large measure obligatory or mandatory, considering the gravity of the issues involved, and the great danger to the safety, prestige, and dignity of the Supreme Court of India. By Art. 121, a restriction has also been placed on discussion in Parliament with respect to the conduct of any Judge of the Supreme Court or of the High Court in the discharge of his duties in order to safeguard the dignity and prestige of the Courts.

There then remains the other safeguard for judicial review, under Sub-Cl. 2 to Art. 368 of the Constitution i.e., if the proposed amendment *seeks* to make any change in the power of the Supreme Court or the High Court or in the Lists to the 7th Schedule representation of States in Parliament or the provisions of Art. 368, the said amendment has to receive the approval of not less than one half of the state legislatures in Parts A and B of the first schedule by resolutions to that effect before the bill making provision for such amendment is presented to the President for assent.

The language used in the above sub-clause clearly mentions "*seeking*

to make a change" which is different from *professing* to make a change. In other words, if in fact the result of the proposed amendment is to make a change in the powers of the Court or the entries in the Lists, or in the provisions of Art. 368 itself, the obligation to consult the States beforehand automatically follows.

That the proposed amendment to Art. 31 virtually results in the amendment of Arts. 138, 139, 140, 141 and 144, etc., though it does not *profess* directly to amend those Articles, (but it seeks to amend those Articles), is plain, and obligation to get the ratification by State legislatures is therefore compulsory.

The Indian Constitution is a product of many compromises, on the part of various conflicting interests, and the Constituent Assembly when it passed the Instrument of this Constitution, no doubt recognised that it was based on the principle of "co-existence". The whole point reduces itself to this. Can an amendment to a Constitution which has been accepted by all parties concerned as a compromise in the Constituent assembly, be ratified by the President, who is above all party politics—the said amendment being brought into being by only a purely temporary majority party in parliament, who seeks by the power behind the strength of their temporary majority, to radically change the Constitution permanently. In such a case can it be said to be in defence of the Constitution and Law ?

In conclusion, as an analogy to the Constitution of a Welfare State, the amendment to the Constitution of Norway which is itself a Welfare State, will show, what exactly is meant by an amendment to the Constitution of a Welfare State, provided specific recital is not made for a total variation of the Constitution. Art. 112 of the Constitution of Norway recites as follows :

"If exprience would show that any part of this Constitution of the Kingdom of Norway requires to be altered, the proposition therefor shall be submitted to the first or second ordinary storthing after a new election and be published in print. But it is only the first or second ordinary storthing after the next election following which shall have power to decide whether the proposed alteration should be made or not. *Such alteration, however, must never be inconsistent with the principles of the Constitution.* But must only bear on such modification of particular provisions *as do not change the spirit of the Constitution* and two-thirds of the *storthing* must agree to such an alteration.

An amendment of the Constitution adopted in the manner aforesaid shall be signed by the President and Secretary of the Storthing and be sent to the King for public notification in print as forming an integral part of the Constitution of the Kingdom of Norway." (Vide Peasle's Constitution of the Nations Vol. II, page 687 to 688).

It is for the Supreme Court to consider whether the proposed Amendment to Art. 31 of the Constitution is really consistent with the spirt of the Constitution so as to be a valid amendment.

SUMMARY OF RECENT CASES.

13—4—1955 R. C. No. 86 of 1954 etc.

Govinda Menon & Krishnaswami Nayudu, JJ.

PARAMESWARAN NAMBUDIRIPAD *v.* P. R. SWAMI IYER

Malabar Tenancy Act, (XIV of 1930 *as amended by Act XXIV of* 1945, *Act XXXIII of* 1951 *and Act VII of* 1954 — *Constitutional validity of Ss.* 21, 23, 25, 34, 38, 42 *and* 43 *of Act XIV of* 1930 *and S.* 52 *of Act XXXIII of* 1951 *and also sections relating to the renewal fees abolished by Act XXXIII of* 1951.

The above main case was withdrawn to the Madras High Court under Art. 226 of the Constitution from the District Munsif's Court, Alatur to consider the constitutional validity of certain provisions of the Malabar Tenancy Act (1929) Act XIV of 1930 as amended by Madras Acts XXXIII of 1951 and VII of 1954.

Their Lordships delivered differing judgments.

Govinda Menon, J:—

General arguments were advanced in Referred Case No. 86 of 1954 which was a suit to redeem a Kanom on the ground that the lease period had expired and the Kanomdar had failed to get a renewal by paying the renewal fee.

The first question for consideration was whether a Kanom is a mortgage or a lease. From the evidence before the Court it was concluded that the bulk of lands in Malabar was held in Kanom Tenure. Before the 1930 Act was enacted the rights aud obligations of the jenmi and the Kanomar were a matter of bitter controversy, the jenmi holding that he was the absolute proprietor of the soil and the Kanomdar was only|a mortgagee while the Kanomdar contended that originally he was a co-proprietor with the jenmi and it was due to the application of English ideas and terms to the Malabar tenure by the British that Kanom came to be regarded as a mortgage. With a view to settle this controversy and by a legislation the Government appointed various committees and officials to go into the question. These committees and officials, especially those who were conversant with Malabar conditions, were of the view that Kanom was more of a lease than a mortgage. It was the Sudder Court established in 1854 that for the first time decided that Kanom is a mortgage. The result of this was a large number of eviction suits and consequent agrarian discontent. It was to settle this controversy that the Legislature intervened to define and declare the legal incidents and also the duties, rights and obligations *vis-a-vis* the jenmi and the Kanomdar. There is not a single decision which has held that a Kanom was onlya mortgage. The provisions of Act XIV of 1930 converted the relationship between the jenmi and the Kanomdar into one between landlord and tenant and that the Act stressed the lease aspect more.

In the neighbouring States of Travancore and Cochin also by a series of Regulations, the *Kudiyan* has come to be regarded as the owner of the soil and the jenmi as a mere receiver of rent.

It was contended by the plaintiff jenmi that he was deprived of his proprietary rights by Ss. 17 and 20 of the 1930 Act. This was based on the assumption that he was the absolute proprietor of the land. This right of the jenmi had been opposed by the Kanomdar for the past three quarters of a century. The Act of 1930 for the first time conferred rights and imposed liabilities on both the jenmi and the Kanomdar and so, it cannot be said that any admitted right of the

jenmi had been taken away by that Act. It is only when some well-recognised right to property is interfered with, that Art. 31 (2) of the Constitution can be invoked. "It cannot be said that Act XIV of 1930 in any way interfered with the undisputed and well-recognised rights of the jenmi or attracted the provisions of Art. 31 (2) of the Constitution." As there was no limitation on the rights of the jenmi the provisions of Art 19 (1) (f) cannot be attracted and as the provisions did not contravene Art. 14 also, His Lordship held that no part of the Madras Act XIV of 1930 did, in any way, infringe or was repugnant to any of the Fundamental Rights conferred by Chap. III of the Constitution.

The validity of the provisions of the Amending Acts of 1951 and 1954 were next considered. The granting of fixity of tenure by S. 21 to Kanomdar had been attacked as curtailing the proprietary rights of the jenmi thereby offending Art. 31 (2) of the Constitution. His Lordship observed that even the 1930 Act had given the Kanomdar qualified fixity. What the Amending Acts did was to make this fixity permanent thereby placing the Kanomdar on the same level with the Verumpattomdar. It was held that there was no deprivation of property so as to attract Art. 31 and 19 (5) (L) of the Constitution. It cannot be understood how the jenmi can be said to be discriminated against due to discrimination between the cultivating and the non-cultivating Kanomdar. There is nothing in S. 21 of the Amending Act which contravened the provisions in Art. 14. With regard to the attack on the grant of fixity to non-cultivating Kanomdars, it has to be observed that if it had not been granted, there would have been a discrimination as if the non-cultivating Kanomdar was not granted fixity, an anomalous situation would arise when a cultivating Kanomdar leases out the property.

The granting of a "Melcharth" was not disposing of property as the ownership in the property does not pass to the melcharthdar. It is only a transfer of an interest in immovable property ; so it cannot be said that it is a restriction on the power of the jenmi to dispose of his property. Further, even in the earlier Act, the jenmi had only a restricted right to grant a melcharth. So the concerned provision does not infringe Art. 19 (1) (L).

The Explanation added to S. 25 (4) of the Amended Act to the effect that in considering the requirements for maintenance regard should be had only to primary needs, does not in any way infringe the right of the jenmi to hold and dispose of property under Art. 19.

The provision in S. 25 (6), proviso (iii), only postpones the right to sue for eviction of a transferee *inter vivos* and that being only a matter of procedure, it could not and did not affect any of the provisions in the Constitution.

The next provision to be attacked was S. 25 (6), proviso (iii) (a) which, provided that suits for eviction under S. 25 (4) and (5) could be instituted only at the end of certain periods. As the granting of fixity to a kanomdar has been held as not infringing any of the Fundamendal Rights guaranteed by the Constitution, an exception to such fixity, which the above provision was, could not offend any of those Fundamental Rights.

Section 42 of the Act, as amended in 1951 and 1954, was attacked as discriminatory in that it allowed a tenant to surrender the holding by a registered document while the jenmi could not put an end to the lease at the end of a term. It was held that because the two classes did not have similar rights, a reciprocity was impossible and unnecessary. In the result, Ss. 21, 23 and 25 of the Act were valid.

S. 34 of the Act which conferred on Kudiyiruppu holders the right to purchase the holdings even in the absence of a suit for eviction was attacked as

offending Art. 31 (2) of the Constitution. This contention would have had full force if there had been no provision for compensation. But the section provides for payment of the market price. It was only right, that peasants who remained in their holding for a period of 10 years should be given such a benefit. This would therefore be quite within the powers of the legislature to enact.

Summing up, none of the provisions of the Act XIV of 1930 as amended by Acts XXXIII of 1951 and VII of 1954 offended any of the Articles of the Constitution. At most, it may be said that some provisions were drastic from the jenmi's point of view. But the trend of and the need for agricultural legislation cannot be lost sight of.

Krishnaswami Nayudu, J.:—The point for determination is whether the provisions of Act XIV of 1930 in so far as they interfered with the rights of the jenmi regarding redumption and abolition of renewal fee can be said to be offending the provisions of the Constitution. After an examination of the materials placed before the Court it was held that the definition of Kanom in the Act embodied all the necessary ingredients of a Kanom as understood in law and by custom. A Kanom is a combination of a mortgage and a lease and it is neither a lease nor a mortgage as contended by the Kanomdar and the jenmi respectively. But the discussion regarding whether a Kanom is a mortgage or a lease is only of academic interest as it would not be necessary for the determination of the constitutional validity of the Malabar Tenancy Act XIV of 1930. All the same, His Lordship stated he could not hold that it was a lease pure and simple.

The contention of the defendants that the relationship of a lessor and lessee, between a jenmi and the Kanomdar, was for the first time created by the 1930 Act, would be unsustainable. Even the definition of Kanom in the Act contradicts this view. Of course, the rights conferred on the Kanomdar by the Act of 1930 did not exist before the Act but were purely the creatures of the statute. The complaint was that this granting of new rights curtailed the rights of the jenmi thereby infringing the Fundamental Rights Provisions in the Constitution.

It was only after a careful consideration of all the material factors, as evidenced by the various committees and officials appointed to go into the matter, that the Act XIV of 1930 was passed. The object of the Act was to better the conditions of the tenants and to create better relationship between the landlords and tenants. None of the provisions of the original Act (XIV of 1930) could be said to contravene the Constitution.

Then the question, how far the provisions of the Amending Acts of 1951 and 1954 deprived the jenmi of his proprietary rights, arises for consideration. One of the most important rights of the jenmi as the absolute proprietor of the Kanom lands was his right to redeem the Kanom after the expiry of 12 years. The Act of 1930 gave the Kanomdar virtual fixity in so far as he could not be evicted except on grounds specified in the Act. Further, once the Kanomdar tendered the renewal fee, the jenmi had no choice but to grant a renewal. The 1951 Amendment expunged all the provisions relating to renewals, and renewal fees from the Act thereby giving the Kanomdar absolute fixity of tenure in express terms. The right to recover possession being undoubtedly an important right in property, its deprivation to be valid constitutionally, should be for a public purpose and there should be suitable compensation. It is the further complaint of the jenmi that to crown all these, even the non-cultivating Kanomdar, clearly an intermediary, is given unconditional fixity of tenure.

The 1951 Act further deprived the jenmi of his right to the renewal fee. After examining the history, nature and incidents of the renewal fee, it

was held that it was consideration for the granting of kanom that was to be treated as an additional kanartham for a kanom, for a further period of 12 years. The renewal fee is a necessary ingredient of kanom. The granting of unconditional fixity and the repeal of the provisions relating to renewals by the 1951 Act were clearly due to the erroneous understanding of the kanom as a lease, pure and simple and the kanomdar as the tiller of the soil. Most of the Kanomdars are only intermediaries. The principles generally applicable to landlord and tenant cannot be applied to jenmi and Kanomdar because of the peculiar incidents of the system. 12 years would be the customary period of a Kanom and by custom the jenmi had a right to renewal fees. So it would be upsetting the sound economic conditions of Malabar to remove the customary period and to deprive the jenmi of the renewal fee. There is no provision in the Act to compensate the jenmi, atleast, by a revision of the Michavaram. The provisions of the 1951 Act granting unconditional fixity of tenure to the Kanomdar and repealing the provision relating to renewal fees, in addition to being extremely unjust, have also resulted in clear and substantial deprivation of the proprietary rights of the jenmi and being not for any public purpose and there being no compensation, would be *ultra vires* the power of the legislature as contravening the provisions of the Constitution.

S. 34 of the Act as amended in 1951 and 1953 gave the holder of a Kudiyiruppu, who had been in occupation for 10 years, a right to apply for purchase of the holding even in the absence of a suit for eviction. Under the original Act, the tenant could exercise such a right when there was a suit for eviction. Further, under the earlier provision, the 10 years' period, should be prior to the institution of the suit, while in the Amended Act the period could be before or after the Act of 1951. It cannot be understood why this provision was introduced when the holders of Kudiyiruppu were sufficiently protected from arbitrary evictions by the granting of fixity of tenure and enumeration of the grounds under which there could be a suit for eviction. The only effect of the provision is to deprive the jenmi of his property. This is clearly in contravention of the provisions in the Fundamental Rights Chapter of the Constitution, as there was no "public purpose."

In the result, the following sections of the Amending Acts of 1951 and 1954 were held void as offending the provisions of the constitution :

(1). 5 (vii) (b); (2). 5 (XII); (3 . 15 (to the extent of the inclusion of the kamondar); (4). 19; (5). 20 (ii); (6). 20 (iii) (b); (7). 20 (vi) to the extent of introducing Cl. (ii) to the second proviso and Cl. (a) to the (third) Proviso to S. 25; (8). 22; (9). 29; (10). 32; (11). 36; (12). 40); (13) S. 50 and (14) 41 of Act XXXIII of 1951 and S. 15 (1) of Act VII of 1954.

Messrs. *M. K. Nambiar, N. Sundara Iyer, D. H. Nambudripad, A. K. Ramasesha Iyer,* and *M. K. Brahmadathan Nambudripad* for Plts.

Messrs. *K. Raja Iyer, K. V. Suryanarayana Iyer, K. Vaitheeswaran* and *S. K. Subramanian V. K. T. Chari (Adv. Genl.)* and *C. A. Vaidyalingam (Govt. Pleader)* for Defts.

Reported by :

Sri M. K. Brahmadathan
Nambudripad
Advocate, Madras.

V. C. S. —

Retirement of Mr. Justice Mack.

We wish to tender our respectful and affectionate farewell to His Lordship, the Hon'ble Mr. Justice Mack on the eve of his retirement from the Bench of our High Court. In doing so, we readily express our full approval of and accord with the numerous expressions of appreciation of his high qualities as a Judge and man, which have been voiced at several farewell functions held in his honour in Madras and by several eminent speakers, official and non-official.

Just as may be expected from his long experience and training in the Indian Civil Service, he proved to be a Judge endowed with great industry, phenomenal patience and intimate knowledge of human psychology, not only as to those who assisted or served under him but also to the much larger circle of persons who came into contact with him as suitors, pleaders or accused in cases. He has been very fittingly and deservedly described by almost every one of the speakers referring to him as a great human Judge, meaning thereby that he has been endowed in abundance with several great human qualities and virtues. It is quite true that he had also his fair share of some human failings, but in our humble opinion, that only made him all the more lovable and to appear to be much nearer to us than if he had been more perfect. As he himself stated in his most moving farewell speech in replying to the Public Prosecutor, he was often unorthodox in the manner and method of approach to his work and perhaps in a few instances in his decisions also. But it must be stated without the least bit of hesitation or doubt that every decision of his as a Judge was absolutely honest and conscientious and was according to his best lights rendering the greatest measure of justice that lay in his power to render to the afflicted parties. He never claimed or pretended to any high knowledge or proficiency in abstruse principles of law or procedure, but had an instinct which ever guided him in unerring fairness and correctness and which helped him to decide cases in accordance with law and established principles of justice and equity. He was impatient with technical objections and pleas put forward merely to block or delay the course of speedy trial and decision of the dispute before the Court. He would often openly tell the persons putting forward such purely technical pleas or points that he had no sympathy with them and would try to get round them if he could to do what he believed to be justice in the case. The members of the Bar who practised before him both in Madras and in the several mofussil centres very soon learnt to know and appreciate his fine qualities and his peculiar beliefs and obsessions and always tried to respect them and get his decisions in their favour avoiding wherever possible references to what may be called as his anathema. He had a few pet notions some of which became obsessions which he never ceased to canvass for whenever he got an opportunity to do so. For one thing, he strongly believed—and we respectfully agree with him—that much better results could be achieved by the members of the Bar forming partnerships among themselves and arranging to work together by dividing and sharing the responsibility and work than under the present system of a single individual having to shoulder the entire responsibility without assistance. He was again a strong denouncer of touting which has been fouling the field of activities of the members of the Bar and as a pest and infliction on the general litigant public. There cannot be two opinions about the justness of this condemnation by Mr. Justice Mack of a most nefarious and degrading institution which has been tolerated, if not countenanced, too long by the authorities and the legal profession. Mr. Justice Mack, of course, was never tired of advocating the idea that as many lawyers as possible should go away and settle at villages and small towns in the mofussil and help the people in those parts to obtain redress at cheap cost. But this idea, however perfect it may look as an ideal, particularly in a

welfare State towards which we are all careening today, has still some elements of impracticability in regard to its actual practice before people most concerned and likely to be affected thereby can be blamed for not putting it into practice. Whatever it may be, the excellence of the ideal cannot be questioned and does great credit to the retiring Judge that he had always held that ideal in front of him and never failed to call for support for it.

It is noteworthy that when Independence came and an opportunity was given to all the foreign officers and Judges in service to declare their choice about continuing or going away, Mr. Justice Mack, along with Mr. Justice Horwill, unhesitatingly elected to continue to serve independent India and felt happy and privileged to do so. He always had a very high respect for the national aspirations of Indians to govern their own country and rule their own destinies.

During his judicial career he had the opportunity of doing every variety of work open to a Judge and as a Judge of crime, either in trial Courts or in appeal, he showed rare insight into the psychology of the accused and the policeman and the prosecuting authorities and very often assessed the true facts with ease by reason thereof. He had the tendency, if we may say so without meaning any disrespect, of acting the Haroun-Al-Raschid on the Bench, trying to investigate and find for himself the truth in all matters primary or even subsidiary, that came up before him.

Mr. Justice Mack is a great sportsman and fond of playing any game in a clean and sportsmanly way. The "Mack Stadium" at Bellary which was subscribed for and built up almost overnight by almost the entire population of a town bears ample testimony to his great popularity and hold on their affection.

He moved freely and without any self-consciousness with the numerous fellow-members of his clubs, drawn from various grades and cross-sections of society. He never played the Judge off his seat on the Bench and it is no wonder that when he declared his intention to retire there was a veritable chorus of regret and expressions of love and affection from all sides marked with the deepest sincerity and most poignant feelings of respect and love.

We wish Mr. & Mrs. Mack all happiness and peace in their future life, wherever it may be, and we have every confidence that the fires of youth which are still lambent in Mr. Mack will not allow him to rest without rendering some service or other to his fellow men at large.

Appointment of Mr. K. Chandrasekharan as Editor of I. L. R. (Madras).

The Madras series of the Indian Law Reports have for quite a long time been enjoying deservedly the reputation of being most up-to-date and containing well reported decisions of importance, selected with great care and attention. Editors like the late Sri M. A. Thirunarayanachariar, Sri R. N. Aingar and Dr. Chowdry have left their impress on that office by their conscientious and able work. It is highly gratifying to us to know that in the place of Dr. V. V. Chowdry who has taken charge of the Andhra Series of the Indian Law Reports, our good friend Sri K. Chandrasekharan has been appointed as the Editor and has also taken charge just before the closing of the Courts. His choice cannot but commend itself to the entire legal profession in our State and in Andhra, several members of which have had opportunities to know and know of him and his many fine qualities. His long connection with the Madras Law Journal and his intimate contact with the several distinguished lawyers who have been successively in charge of that Journal have truly qualified him to take charge of his new office with confi-

dence and to discharge his duties with ease and facility. He has always been of a very studious nature and his considerable learning, both general and legal, cannot but be his greatest asset in the editorial work. Apart from the excellence and merit that heredity has conferred upon him, he can also justifiably claim to have acquired many-sided culture and high proficiency in more than one language and creative ability which has been well proved by more than one literary publication from his pen. Endowed with great personal charm, affable manners and many other lovable qualities, Sri Chandrasekharan will find no difficulty in securing the best results with the ready co-operation and assistance of the entire Bar. We trust that this is only a beginning in the well-merited recognition by established authorities of his high qualities and that several more opportunities will be afforded to him in higher and higher spheres to serve his profession and country. We wish him all success.

Farewell Reference to the Honourable Mr. Justice Mack by the Public Prosecutor on Friday, May 6th, 1955.*

The Public Prosecutor Mr. V. T. Rangaswami Iyengar, made a farewell reference to the Hon'ble Mr. Justice Mack on the eve of his retirement from the Bench. The function was held in the spacious Fourth Court, where His Lordship had been sitting. The Court Hall was packed to capacity with legal practitioners and officials of the High Court. In the absence of the Advocate-General, the Public Prosecutor bade His Lordship farewell. His Lordship was visibly moved by the touching reference and the first few sentences of his reply came haltingly and shaken with emotion.

On His Lordship taking his seat on the Bench at 1·45 P.M. Mr. V. T. Rangaswami Iyengar, sought permission to discharge the duty of bidding farewell to His Lordship in the unavoidable absence of the Advocate-General, and to bring to his notice the feelings of the Bar whom he had been permitted to represent on the occasion.

Referring briefly to the career of His Lordship, Mr. Rangaswami Iyengar said that Mr. Mack entered the Indian Civil Service in 1921 and came over to this Province as Assistant Collector. After necessary training he became Sub-Collector and served in that capacity in various divisions. Even as a youthful officer then, he made no secret of the fact that he was anxious to get into touch with the people, the villagers, and try to do his best for them. Whenever any original suggestion was made by him, it was turned down by the Board of Revenue in the name of the Standing Order. In 1929 he elected to join the judicial service and was appointed District and Sessions Judge, Cuddapah. Wherever he served, the one outstanding characteristic of his was his abundant sympathy for the practitioner and his anxiety to get into touch with important people of the place in order to find out their grievances and how those grievances could be re-dressed. During the war, His Lordship did everything to alleviate the sufferings of the poor and the distressed, who were not able to get the amount of foodgrains they required. This kind of social service and helping the poor and the underprivileged had been his characteristics in whatever District he served. He served for very nearly eight years in Bellary and every one in that District had Mr. Mack's name on their lips and had named the football stadium there as "Mack Stadium". Mr. Rangaswami Iyengar added that he could well realise how His Lordship must have felt when the vivisection of Bellary came about.

Mr. Justice Mack, the Public Prosecutor continued, came to the High Court with rich and varied experience. He made no secret of the fact that touts unduly interfered with litigation and that there was need for

*Report from the Hindu dated 7-5-1955.

practitioners to get into direct touch with villages and villagers so that the mischief done by quacks and half-wits could be avoided. His Lordship had also emphasised the need for preventing fragmentation of holdings on more than one occasion. Some of the noteworthy features of his judicial career were his passion for doing justice, his zeal for arriving at correct conclusions by the exercise of independent judgment uninfluenced by any consideration other than pure justice and the human background underlying every case, and his approach to questions from the commonsense point of view, unhampered by technicalities and precedents. If he found any case coming in the way of what he considered a just decision, he did not hesitate to say that that decision applied to the circumstances of that case only.

Dealing with Mr. Mack's work in the High Court since 1948, the Public Prosecutor said that here also His Lordship brought to bear the same characteristics that he had referred to earlier. In the Original Side he wanted to introduce the experiment of pre-trial, which for the moment did not find favour with practitioners, but which was bound to be appreciated sooner or later. In cases where members of the family were involved he tried to bring parties together so that there might be peace and harmony in the family instead of hatred as a result of acrimonious and costly litigation. In the criminal side, he looked into all available materials for the benefit of the accused. He also felt that the defending Counsel was always at a disadvantage in that he was not supplied with necessary material or record to find out what the version of the accused was at the time of the investigation. He had been trying to improve the system by saying that case diaries should be made available to the accused.

His Lordship made no discrimination between one practitioner and another and no distinction between a senior and a junior, the Public Prosecutor observed. He put innumerable questions to the Advocates and they appreciated that those questions were intended to get the fullest information so that justice might be meted out. He was a sport in Court and out of Court and even if unpalatable things were said, they were forgotten and no rancour was left behind.

After referring to His Lordship's loyalty to the Indian Union and the sympathetic manner in which he dealt with the cases of detenus, the Public Prosecutor concluded by saying that members of the Bar had happy recollections of him as "a good man, a perfect gentlemen, a conscientious Judge and a worthy citizen of the Union of India."

Reply by Mr. Justice Mack.

Mr. Justice Mack said that this farewell and the party the other day made him feel that the Bar, as a whole, regarded him as one of themselves and that they reciprocated in full measure the affection and high regard he had for them. No one was more conscious than he of his own infirmities and imperfections as a Judge. "We Judges do our work in the full blare of publicity watched and heard by you across the Bar with most vigilant eyes and ears. We and you in turn are watched by a very critical and increasingly discerning public who expect of us great things, weighing us in the scales and appraising our work."

Pleading guilty to being an unorthodox Judge, Mr. Mack said: "I have literally argued some cases out for you in Court myself. I often think aloud on the Bench, sometimes to the dismay of my colleagues when I am on a Bench. I sometimes give judgment in accordance with nobody's case. I pay scant regard to precedents in case-law which I think have outlived their usefulness and interfere with justice and equity on the facts of particular cases. I do not believe in the maxim 'Hard cases do not make good law.' All good law, should, in my view, give relief to even hard cases and empower Courts to interpose a bar of equity between so-called settled case-law and even statutory law and a really hard human case. These views have led me to differ

from some of my colleagues on the Bench for more than any Judge in recent times, but of late I have had more than one case in which I have been actively aided and abetted in my unorthodoxy by leading members of the Bar. I feel, my friends, that the conception of the rule of law and the sanctity of contracts need practical reorientation in the context of the prescribed goal of a Welfare State, or, what is called in India to-day, the socialistic pattern of society which is to be—not one law for the rich and another for the poor, not one law for Judges and lawyers and another for the layman, but a law equally and equitably administered for all, with perhaps a heavier punishment for the more educated criminal who should know better than the ignorant and illiterate man whom poverty drives to crime, or whom ignorance of the law, which is no excuse, turns into an unwitting criminal."

"The Madras Bar has indeed great traditions behind it of forensic ability, erudition and learning second to none, I should say, in world history. I have nothing but profound admiration for the facile ability with which you argue so fluently and lucidly in the so-called alien language in which we are speaking to each other to-day—this English—in an illogical unphonetic Roman script in which, however, strangely enough, you seldom, if ever, mispronounce or mis-spell a single word. As a student of world history I do not think I can find any parallel achievement of so complete a mastery of a foreign language in an alien script by the intelligentsia of over 300 million people in the short space of about 150 years. The East India Company with increasing dominion thrust upon them who started teaching English with the object of getting English-knowing clerks to do their business, little dreamt of planting the seed of a mighty force of nationalism which has created the greatest democracy in the making in all human history. I have never ceased in India to marvel at the command of English you show across the Bar, not only you, but all other educated persons in all walks of life down to the lower cadre of clerks in our High Court and all Government offices."

"I would like to thank you most sincerely for putting up so patiently and generously with my unorthodox vagaries, in fact, for your co-operation with them, in the pursuit of our common goal—the dispensation of real justice. After a preliminary period of suspicion, sometimes amounting to resentment at my criticisms of our legal system, I have indeed received from all Bars with whom I have worked—and the Madras Bar has been no exception—great kindness, growing affection and ultimately maximum co-operation."

"I shall always remember my two years or so on the Original Side of this Court enlivened by that dominating and delightful personality, Mr. Gopalaratnam who appeared there before me almost daily, doing that kind of judicial work I have loved best of all which brought me in direct contact with litigants, witnesses and frail and erring humanity. I enjoyed the experience of being cross-examined by one of you in the witness box in two suits I was constrained to file, both, I am glad to say, successful. Another suit against me for damages by a person whom I unsuccessfully declared a tout was successfully defended by Government on my behalf. So I can almost be described as a seasoned litigant with first-hand experience of his feelings and emotions."

"I shall take with me happy memories of my very cordial relations with my Lord the Chief Justice and of my colleagues on the Bench, despite the inevitable differences in various matters."

Mr. Mack said that he would always retain most appreciative memories of his long association with the Public Prosecutor. He had filled his role to perfection, always thorough in his cases, scrupulously fair to the accused, sometimes siding and abetting him (Mr. Mack) in his unorthodox approach to a criminal case,

helping them generally to temper justice with mercy and give criminal case law progressively human interpretation.

"Then there was his very happy and long association on the Criminal and Civil Bench with his colleagues and friends, Justices Govinda Menon and Krishnaswami Naidu, Mr. Mack observed. Many were the disputations he had particularly with the latter behind the scenes, often on the telephone, before they reached agreement and harmonised his unorthodox approach with Mr. Naidu's vast knowledge of case law, precedent gained from his long experience on the Original Side. These discussions only deepened their mutual respect and affection for each other. "I shall indeed keenly feel my separation from these two esteemed colleagues, from whom I have learnt so much. I would like to mention here my all too brief association on the Bench with the late Mr. Justice Govindarajachariar who was taken away from us while in association with me. We have lost in him indeed a great, human and progressive Judge."

Mr. Justice Mack also paid a tribute to the conscientious work and efficiency of successive Registrars and the entire staff of the High Court. He also paid a tribute of appreciation to the Press "for their very high standards of reporting our judgments accurately and so well."

Mr. Mack paid his tribute to the Madras Bar and the Bars of the State doing splendid work under a system not of their making which required, in his opinion, radical reform. "My views are too well-known to you to be elaborated in this farewell talk. The vital need to place our legal system on the solid basis of a constructive legal service working on a partnership basis radiating from the Courts to the most remote village. As I observe, you, seniors and juniors, in action in Court, I am greatly impressed by the wonderful potentialities of your profession if only any of you can be diverted into constructive work into the national social fabric. In the meantime, you are shouldering a heavy responsibility of helping to uphold the Constitution to preserve the rights of liberty of the people and to assist without obstructing the executive Governments in the discharge of their own heavy responsibilities. It has been a very great privilege and honour to me to be appointed a Judge of this Court in 1948 in free India after Independence. Looking back, I would not have had it otherwise and I am really glad now that I did not come up to the High Court in 1942 in my turn. I have seen since 1947 great achievements as well as great tragedies enacted, stupendous problems faced and surmounted in an almost miraculous manner. You, my friends, have a heavy responsibility and great problems confronting you, so great that as I said recently, I am more apprehensive of the future of this great democracy in the making as I leave India now in 1955 than I was in 1947 when I elected to continue in service. But this has not weakened in the slightest degree my conviction that India has a great destiny not only in Asia and in Asian resurgence but in world history to fulfil and that you in this most intellectual of all States of the Indian Union have in that destiny a vital role of leadership to fulfil."

Proceeding, Mr. Mack said that on this occasion he could not go through the various stages of his rather eventful career, to which the Public Prosecutor had referred. There had also been many painful things to which he had referred, like vivisection of Bellary following the vivisection of India itself. Recently they had the vivisection of this old State of Madras. He himself felt vivisected, because he did most of his service in the districts which now constituted the Andhra State. "I still think", Mr. Mack added, "that the best way of preserving continuity and of preserving the solidarity on which the Constitution depends, is for Madras and Andhra to come together again". Everybody was saying that this was impossible. But nothing was impossible for persons of goodwill and

common sense. He did not think it was ulterly impossible to associate the Andhra State with the generosity and practical genius of the Tamils, who knew always which way their bread was buttered, into enjoyment of Madras as a common capital and working out together their destinies again.

Thanking the Public Prosecutor for wishing him and Mrs. Mack happiness in retirement, Mr. Mack said that being a creature of impulse he did not know where he would settle down ultimately. For the present he proposed to see what was happening in the rest of the world. But if any call for service came, which might advance the unity of Asia and what he had very close to his heart namely, "a common Commonwealth nationality for all the Commonwealth nations" he would not hesitate to respond to it.

In conclusion, Mr. Justice Mack once again expressed his gratitude for this farewell reference.

SUMMARY OF RECENT CASES.

10—3—1955. C. R. P. Nos. 2054 and 2229 of 1953.

Ramaswami, J.

Ramanatha Iyer *v.* Santhanagopalan

C. P. C., Impleading of parties subsequent to preliminary decree— Partition suit by sons against father— Creditors applying to be made parties before final decree is passed—Permissibility.

Creditors who have obtained decrees can be made parties in a partition suit filed by the sons of the judgment debtor against the father judgment debtor before the final decree is passed and after the passing of the preliminary decree. In such circumstances, the creditors can be brought on record as proper or necessary parties before the final decree proceedings and the provisions of Chap. III of Part 2, Civil Rules of Practice and Circular Orders (page 261, Vol. I) and the rules relating to partition suits under the C. P. C., could be applied to such cases.

Messrs. *M. Natesan* and *N. Sivamani* for Petr.

Mr. *C. A. Seshagiri Sastri* for Respt.

V. C. S.

11—3—1955. C. R. P. No. 2192 of 1952.

Rajamannar, C. J.

Peria Munia Gowndan *v.* Ramaswami Gowndan.

C. P. C., S. 11, *Res judicata*—Suit by a member of joint family for partition — Finding that no outstandings are due to the family—Subsequent suit by another member for recovery of dues—*Res judicata*— Applicability.

Where in a suit by a member of a joint family for partition of the family properties, one of the issues was regarding the outstandings due to the family which was decided as not existing, and subsequently certain other members of the family who were defendants in the previous suit filed this suit on the allegation that those debts were due and owing to the family, and had been collected by the other members,

Held: the suit would be barred by *res judicata* as it is a case where in the prior proceeding the existence of these outstandings was definitely asserted and denied and a decree was passed without including these outstandings, and as there was also no question of any fraud or mistake.

Mr. *V. S. Rangaswami Ayyangar* for Petr.

Mr. *P. S. Kailasam* for Respt.

V C. S.

22—3—1955. C. R. P. No. 129 of 1953.

Ramaswami, J.

Badanmaljee *v.* Shermal.

Contract Act, S. 49—Terms to repay money borrowed—Failure to fix the place of performance—Principle of "debtor must find creditor"—Applicability—C. P. C., S. 115—Revisional jurisdiction of High Court—Scope.

Under the Indian Law as enacted in S. 49 of the Contract Act, where no place is fixed for performance of a promise, whether it is to deliver goods or to pay money, it is the duty of the debtor to apply to the creditor to fix a place for the performance of the promise. Where the debtor does not apply to the creditor to appoint a place the common law rule applies and there is an implied promise to pay the creditor wherever he might be.

A. I. R. 1926 Mad. 1207 followed. Case-law considered.

Though the objection as to jurisdiction might have been taken in a case at the earliest possible opportunity having regard to the principles of revision, it is a well settled practice of the High Court not to interfere in the exercise of its revisional jurisdiction, if no attempt has been made to show that the revision petitioner has been prejudiced in any way by the case being tried at the place B instead of at A, or that the disposal of the suit had been prejudicially affected on the merits. The High Court will not usually interfere in revision if the result of an irregularity of the lower Court has been to promote justice. Where it is clearly proved that the defendant owes money to the plaintiff and a decree is passed against the defendants, the High Court will not interfere on a point of jurisdiction, as the High Court will not use its revisional powers to bring about injustice. The interference of the High Court would be confined to cases where the illegality or irregularity was such as had occasioned or might occation a substantial failure of justice.

Mr. *T. R. Sundaram* for Petr.

Mr. *A. Balasubramanian* for Respt.

V. C. S. ——

7—4—1955. Crl. R. C. Nos. 816 to 818 of 1954.

Rajagopalan and Rajagopala Ayyangar, JJ.

Hussain Bi *v.* The State.

Madras Prohibition Act, Ss. 4 (a), 16 and 18—Power to regulate the manufacture, possession or sale—Legality—Validity of R. 6 of the Notification regarding French Varnish—Power of confiscation if can be exercised for offences committed in respect of the Notification—Constitution of India, Art. 19 (5).

The Madras Prohibition Act is modelled on a basis different from that of the Bombay Act, the intention of the statute to exclude medicinal, toilet and industrial preparations from the general operation of the Act is made clear in the preamble and this purpose is achieved by the enactment of Ss. 16 and 18.

While the mere fact that preparations used for medicinal, toilet or industrial purposes are liable to be misused will not be a sufficient ground for banning them completely, the Legislature or the rulemaking authority is entitled to take steps to regulate their manufacture, possession or sale, provided the regulation does not impose any unreasonable restraint or amounts virtually to a prohibition of their possession or use. There is nothing in R. 6 of the Notification 5452, dated 19th December 1952 which enacts any prohibition or which exceeds the limits of a reasonable restriction which the State may impose under Art. 19 (5) of the Constitution. Therefore, R. 6 of the Notification is valid and is not unconstitutional.

On the question whether the Magistrate has jurisdiction to pass an order of confiscation of the property which was the subject matter of the offence,

Held: in view of the specific provisions in Ss. 13 and 14 in this Act, it would not be open to the Magistrate to invoke the powers of confiscation under S. 517 of Cr.P.C. On a proper construction of the provisions of the Madras Prohibition Act, the expression "the offence committed against the Act" in Ss. 13 and 14 cannot comprehend the contravention of a notification issued under S. 16. The Act has drawn a clear distinction between the offences in regard to liquor and intoxicating drugs pure and simple, in respect of which a prohibition was being enforced, and those preparations containing alcohol used for medicinal and toilet or industrial purposes in regard to which a restriction only was being enacted. Therefore, a breach of the rule is not an offence against the Act within the meaning of Ss. 13 and 14. It therefore, follows that there is no power in a Magistrate to direct confiscation of the goods involved in the commission of an offence under the Rule.

Mr. *S. Mohan Kumaramangalam* for Mr. *A. Jagannath Rao* for Petrs.

The Advocate General and the Public Prosecutor for the State.

V. C. S. ——

13—4—1955. C. R. P. No. 58 of 1955.

Ramaswami, J.

Swarnambal *v.* Dhakshinayani Ammal.

C. P. C. O. 33, R. 5 — Scope—Cause of action, existence as to—Enquiry—Nature of.

In regard to materials on which the Court has to find out whether the plaintiff's allegations do not show a cause of action, there is a marked distinction between the materials contemplated under O. 33, R. 4, which is the stage before the notice is issued and the opposite party appears and R. 7 when the opposite party appears the matter is heard and arguments by both sides are submitted. In the former case, the materials before Court will consist of the allegations in the plaint and the examination of the applicant or his agent regarding the merits of the claims and the property of the applicant. In the latter case, the materials will consist of the allegations in the plaint, the result of the examination of the witnesses produced by either party of which a memorandum of the substance of their evidence will have to be made by the Court and the arguments of the parties. But in both cases, however, what has to be considered, as the basis of deciding whether a cause of action is shown or not, is the allegations of the plaintiff.

Where the plaint alleges the creation of a oral charge on the basis of which the cause of action is erected, and which will be invalid when it is above the value of Rs. 100 in regard to immoveable property, the Court can find that the plaint discloses no cause of action.

Mr. *S. Ramachandra Ayyar* for Petr.

Mr. *T. R. Ramachandran* for Respt.

V. C. S. ——

The Late Mr. K. Narasimha Ayyar, Advocate, Madras.

It is our painful duty to record our deep feelings of sorrow at the passing away of Sri K. Narasimha Ayyar, Advocate, Madras, on Sunday, 5th June, 1955, after a brief illness. He was the seniormost member of our Editorial Committee having been connected with our journal in that capacity for well nigh 30 years. He was always anxious and ready to render all such assistance as lay in his power in the conduct of our Journal and we are the poorer for his loss. He has been for many years a familiar figure mostly on the Original Side of our High Court, where he commanded a large and lucrative practice. He was a very efficient trial lawyer, fully conversant with the Rules and Procedure of the Original Side and other trial Courts and had in addition an inexhaustible fund of human experience to help him in dealing with parties and witnesses in trials. His work was characterised by thoroughness of preparation and his advocacy was direct and tenacious. He was one of the very few survivors of a previous generation of legal practitioners who aimed for thoroughness in their work and the presentation of their clients' causes with tenacity and purpose. He was an amiable and kind gentleman who was often found with a number of junior members of the Bar surrounding him and listening with appreciation and enjoyment to his reminiscence and experience. He was learned in Tamil literature and was deeply religious in his outlook. We offer our sincere condolences to his son Sri K. N. Viswanathan, Advocate, and his son-in-law Sri T. V. Subramanyam, Judge, City Civil Court, Madras.

Reference in The High Court.

A reference was made on Tuesday, 7th June 1955, at 11 A. M. by the Advocate-General, Mr. V. K. Tiruvenkata Chari, before the vacation Bench of the High Court consisting of Their Lordships Mr. Justice A. S. Panchapakesa Aiyar and Mr. Justice W. S. Krishnaswami Nayudu.

The Advocate General said that with deep regret he had to refer to the death of Mr. Narasimha Aiyar, Advocate, on Sunday, after a very short illness. Their Lordships and other members of the High Court had found in him a very familiar figure whom all of them would miss when the Courts re-opened after the vacation. Mr. Narasimha Aiyar was an Advocate of 49 years' standing and just before the vacation they were even mentioning that next year, he would be celebrating the completion of 50 years at the Bar. He was an apprentice under the late Mr. Justice C. Sankaran Nair when the latter was practising at the Bar. As a junior, he had the privilege of being associated with stalwarts of the Bar like Mr. Sankaran Nair, Mr. T. Rangachari and others. In the early years of his career, his work was on the criminal side. After ten years of work on the criminal side, he transferred himself to the civil side and built up a large practice on the Original Side of the High Court. The Advocate-General said that in his own early days at the Bar, he had the pleasing and useful experience of instructing Mr. Narasimha Aiyar in a number of cases.

Proceeding, the Advocate-General said that during the last two decades and more, Mr. Narasimha Aiyar was a prominent figure in the Original Side of this Court and successive Judges had heard his arguments and appreciated his conduct of cases. He belonged to the small coterie of leaders on the Original Side like Dr. C. P. Ramaswami Aiyar, Mr. V. V. Srinivasa Iyengar, Mr. T. R. Venkatarama Sastri and Mr. V. Radhakrishnayya. Thorough preparation characterised his conduct of cases. He was very successful in cross-examination. Witnesses were generally on their guard when facing cross-examination at the hands of persons like him and Mr. Nugent Grant. Mr. Narasimha Aiyar's success in this respect was due to his suave methods.

Mr. Narasimha Aiyar was associated with the *Law Weekly* for over 30 years. He was well read in Tamil

classics. He was religious-minded and connected with a number of temples. He was very popular with the members of the Bar and when not actually engaged in Court, he used to be a familiar figure seated on the practitioners' bench in the corridors of the High Court. He was a member of the Cosmopolitan Club. He was also Secretary of the Advocates' Association for some time.

Apart from these professional and social activities, he was also connected with the Congress struggle in those days, though not as an active member thereof. Congress leaders relied on him at a time when supporting the Congress was a slightly dangerous practice. He has left behind him his wife, a son, Mr. Viswanathan, who is also a member of the Bar, a daughter, Srimathi Manjubhashini a member of the Legislative Council, and an active political and social worker who has participated in the Congress struggle and courted imprisonment, and Mr. T. V. Subramaniam, his son-in-law, a member of the judiciary. The Advocate-General said that he would convey to the members of the bereaved family the condolences of the Bench, along with the condolences of the Bar.

Reply by the Hon. Mr. Justice A. S. P. Ayyar.

Associating himself with the remarks of the Advocate-General, on behalf of the Bench, Mr. Justice Panchapakesa Aiyar said that he had known Mr. Narasimha Aiyar for the past 15 or 20 years as he had appeared in the mofussil also. He had always created an impression by his skilful and unobtrusive cross-examination. Witnesses were never aware of the skill of his cross-examination till they were actually trapped. That quality gave him a great advantage. Mr. Narasimha Aiyar was noted for the pugnacity with which he clung to what he considered was right. The Madras Bar somehow or other had a rich variety among its members each differing from the other. His Lordship gave instances which brought out the fine sense of pertinacity and innate good humour of Mr. Narasimha Iyer as a practitioner. In the Cosmopolitan Club he was a very popular figure and his talks on many topics like the language problem were listened to with rapt attention. It was sad to contemplate that they could not listen to him again. He said he was shocked to see the notice of his death in the Club. But even in death he was as peaceful as he was in life. It was the typical Indian philosophical background that he had which gave him this peaceful death. As a matter of fact he told him casually just before this vacation: "I have lived for 75 years peacefully and contentedly. I want to die suddenly and peacefully. I have discharged my duties and therefore I am not afraid of death."

Mr. Justice Panchapakesa Aiyar added that during recent years many stalwarts of the Bar, particularly those practising on the Original Side, had departed. The Original Side was itself disappearing and it looked as if giants of the Original Side were also disappearing with it. His Lordship said that the Bench joined wholly in conveying their heart-felt condolences to the bereaved members of the family, of whom one was an Advocate and another a Judge of the City Civil Court.

Adding a few words of tribute of his own to the memory of the late Mr. Narasimha Aiyar, while associating himself with the sentiments already expressed, Mr. Justice Krishnaswami Nayudu said that the Bar had lost in Mr. Narasimha Aiyar an able and experienced Advocate, one of the few surviving veterans on the Original Side trained in its traditions, which generation was unfortunately fast disappearing. In His Lordship's early days at the Bar, he had the advantage of assisting Mr. Narasimha Aiyar in several important cases and had the opportunity of observing at close quarters his superior ability as an Original Side lawyer. He was a master in every branch of Original Side work from the stage of drafting of pleadings to the conclusion of trial. He was an adept in the handling of witnesses and was superb in cross-examination where he displayed his rare skill, intellectual rigour and

adroitness to the great advantage of his clients. He figured as leading Counsel in many of the important and successive trials in the High Court, not only on its civil side but in the criminal sessions as well where he distinguished himself by his great ability and bold advocacy. His advocacy evoked the appreciation and admiration of successive Judges who presided on the Original Side, in particular the European Judges who had a great regard and respect for him.

His Lordship considered Mr. Narasimha Aiyar's death as a personal loss, as he had enjoyed his friendship both in and outside the Bar for more than a quarter of a century, having also been associated with him in several other spheres, though he was mainly wedded to his work in Courts. He was popular among the members of the Bar and the public and possessed an amiable temperament. He was an entertaining conversationalist who would be greatly missed in the Cosmopolitan Club. *

SUMMARY OF RECENT CASES.

1—3—1955. A. A. O. No. 512 of 1954.

Krishnaswami Nayudu, J.

Nainammal *v.* Muhammad.

Guardians and Wards Act, Ss. 7, 10 and 25 —Custody of a child — Appointment as guardian under the Act—Not necessary—Meaning of the words 'ward' and 'guardian'.

It is not necessary for a guardian like the father who applies for the custody of a minor under S. 25 of the Act to establish that the guardian has actually been removed from the custody as the language of S. 25 of the Act would suggest. Notwithstanding the circumstance that in a particular case the minor appears to have been for some considerable time continuing to live with the mother that circumstance would not stand in the way of the father asking for the custody under S. 25 of the Act as the father must be deemed to have had custody of his ward.

Neither the definition of the term "ward" nor "guardian" in the Act would suggest that "ward" would necessarily mean a minor for whose person and property a guardian has been appointed by the Court; nor a guardian would mean a person who is appointed as guardian under the Act of the person and property of the ward. The definition is general and therefore a legal guardian or natural guardian is entitled to the custody of the minor by virtue of the personal law governing them under S. 25 of the Act without the necessity of making an application under S. 7 for appointment of himself as the guardian of the minor's person and property.

Both on the language of S. 25 and on the accepted interpretation of that section it will be open to a guardian to apply under S. 25 for the custody of the minor and it would not make any difference if such a prayer is included in a petition for the appointment of the father as guardian of the person and property and the petition is confined to a relief only under S. 25 of the Act.

Mr. *G. Jagadisa Ayyar* for Appt.

Mr. *K. V. Srinivsa Ayyar* for Respt.

V. C. S. ——

3—3—1955. C. R. P. No. 1933 of 1952.

Somasundaram, J.

Venkata Krishna *v.* Sri Lakshmi Nivas Co.

Madras Buildings (Lease and Rent Control) Act, S. 7 (2) (a) Subletting without landlord's consent—Continuation of a business by a partner of a firm — Constitution by that partner of a new firm, whether amounts to subletting.

Where originally a partnership consisting of 3 persons occupied a certain premises for the purpose of carrying on business and subsequently one of them alone continued to occupy it and later on formed another partnership with 2 other persons and carried on a different business,

Held: (on the facts of the case) it cannot be said that there was any subleasing or subletting of the premises or hold that there was an implied assignment of the lease by that partner to a new partnership which consisted of himself and two other partners.

(1949) 2 M. L. J. 423 : Considered.

52 M. L. J. 8 : Referred to.

Messrs. *M. S. Venkatarama Ayyar* and *T. Krishna Raju* for Petr.

Messrs. *N. K. Mohanrangam Pillai* and *N. K. Pattabhiraman* for Respt.

V. C. S. ——

7—3—1955. S. A. No. 2[illegible]3 of 1951.

Govinda Menon, J.

Rangaswami Iyer *v.* Venkataswami Iyer.

Practice— Representations in Court by Counsel— Statement that a party is dead—Duty of Court to accept — Rejection of statement as not supported by evidence—Improper.

Responsible Counsel making representations to Court that a party is dead should be deemed to have addressed the Court on instructions and it is not permissible to the Judge to hold that there was no evidence about the death of the party and that on the records as they stood that party would be alive. If the Court is not prepared to accept the assertion, the Counsel might be directed to file an affidavit to that effect; and without doing so, it would not be open

* **Report taken from the Hindu and the Indian Express, dated 8-6-1955.**

to the Court to brush aside the statement of Counsel.

Mr. *K. P. Ramakrishna Ayyar* for Appt.

V. C. S. ———

8—3—1955. A. A. O. No. 109 of 1952.

Krishnaswami Nayudu, J.

H. R. E. Board *v.* Gopalakrishna Iyengar.

Madras Hindu Religious Endowments Act (II of 1927) S. 9 (12) — Public Temple — Definition of—Dedication—Absence of proof —Mere presence of external features of a temple—Evidence not sufficient— Right of the public to worship—Scope of.

The definition of a temple under S. 9 (12) is that it is a place by whatever designation known used as a place of public religious worship and dedicated to or for the benefit of, or used as of right by, the Hindu Community or any section thereof, as a place of worship. However much a construction may resemble a temple as it is commonly understood amongst the Hindu community, to bring it within the scope of the Act, it has to be established that it is used as a place of public religious worship and dedicated to, for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of religious worship.

Where there is no deed of dedication in respect of a temple and the only document which makes any reference to the temple and its property is the partition deed in which it was treated as a joint family property and partitioned amongst the members and there has been no endowment to the temple nor any evidence of *mandagapadis* or *ubayams* or *kanikkais* from the public to the temple, it cannot be said that such an institution is a public temple within the meaning of that term in the Act.

The mere fact that there are some of the external features of a temple would not justify the conclusion that it was dedicated to the public or that the public had acquired a right to worship it. Any place constructed for installing a deity whether inside a house or outside, will have the appearance of a temple and that circumstance alone by itself cannot be a ground to hold that it is a temple to which the public had acquired a right to worship.

The fact that the property is in the name of the deity, as the patta indicates, would not again be sufficient to show the intention on the part of any one to dedicate it to the public.

It is not in consonance with Hindu sentiments or practice that any one who comes to worship the deity, even though it is installed within the precincts of a house, should be denied that pleasure, and no member of the Hindu community would turn out a willing member the public, who comes to worship a deity. What has to be found is as to whether there has been anything to show that the public have acquired a right to use the place as a place of religious worship.

Much importance cannot be attached to the taking of the deity in procession once or twice a year, as in the present case. Processions being one of the modes of celebrating a festivity in a Hindu household, a Hindu family in celebrating the festival of its family deity resorting to processions of the deity could not be imputed with the intention that the purpose behind it is to facilitate the public to worship it.

The Govt. Pleader and Messrs. *M. Seshachalapathi* and *M. Chockalingam* for Appt.

Mr. *D. Ramaswami Ayyangar* for Respt.

V. C. S. ——

10-3—1955. O. S. A. 61 of 1954.

Rajamannar, C. J. and Somasundaran, J.

Arulanda *v.* Rajaratnam.

Succession—Probate—Grant of—Revocation—Citation—Court's powers.

Where the executor appointed under a will applied for the grant of a probate of the said will which was duly granted and subsequently two other applications were filed by different persons, one claiming to be the father's sister's son of the testator and praying for the issue of a citation to the grantee of the probate to revoke the order granting probate and alleging that the will was not genuine and another application by persons claiming to be the brothers of the testator's wife and alleging that the property disposed of by the will belonged to the testator's wife and not to him and that they were entitled to the same as the testator was not competent to dispose of the said property;

Held: so far as the first application is concerned, the applicant claimed to be the nearest *bandhu* and heir of the deceased testator and he would be entitled to allege that the will was not genuine and oppose the grant of a probate and the Court would therefore have to decide whether the relationship is true or not.

So far as the application by the other persons are concerned claiming title to the property disposed of by the will *de hors* the testator, their objection to the will was based on the lack of competence on the part of the testator inasmuch as the property did not belong to the testator. Obviously such objections are outside the province of a Court of probate and would not be maintainable.

32 L. W. 431 followed.

Mr. *T. Thyagaraja Ayyar* for Appt.

Mr. *K. S. Narayana Ayyar* for Respt.

V. C. S. ——

11—3—1955. O. S. A. No. 25 of 1954.

Rajamannar, C. J., and Somasundaram, J.

V. V. Iyer *v.* Official Assignee.

Presidency Towns Insolvency Act, S. 56 —Scope—Court's powers.

It is true that in an application purporting to be under S. 56 of the Presidency Towns Insolvency Act, the Court is not called upon to ascertain when an alleged payment was made to one who was not really a creditor. If that is the case of the Official Assignee and he wants to claim relief on behalf of the creditors on that basis, he may have his remedy by way of recourse to other proceedings, but an application under S. 56 of the Act is not the proper remedy.

But assuming that the person to whom payments were made by the insolvent was a creditor of the insolvent and that the

amounts paid by the insolvent are paid towards the liability of the insolvent are him, it is permissible for the Court to consider whether those payments would amount to a fraudulent preference and to hold that they would amount to a fraudulent preference falling within the provisions of S. 56 of the Presidency Towns Insolvency Act.

Mr. *N. Panchapakesa Ayyar* for Appt.

Messrs. *V. Thyagarajan* and *M. Chockalingam* for Respt.

V. C. S. ——

11—3—1955. Appeal No. 718 of 1950.

Mack, J.

Daniel *v.* Gnanasundaram.

Registration Act, S. 37 — Unregistered document—Admissibility for collateral purposes—Evidence Act.

Where a partition deed which is said to embody a decision of panchayatdars with lists of properties contained in another document was not registered, that may not constitute evidence as such as regards the partition ; but they would be admissible for the collateral purpose of showing the nature of the possession and enjoyment of the property and to establish the fact of a completed partition.

43 Mad. 244 (P. C.) : Followed.

I. L. R 1945 Mad. 160 : Considered.

Mr. *R. Gopalaswami Ayyangar* for Appt.

Messrs. M. *S. Venkatarama Ayyar* and *G. R. Jagadisan* for Respts.

V. C. S. ——

15—3—1955. C. R. P. No. 2383 of 1952.

Mack, J.

Mohammed Yakub *v.* Duraiswami.

Contract—Money advanced in respect of a contract of sale — Transaction falling through—Right of the vendor to recover advance—Defence of forfeiture on the basis of deposit by way of security for purchase of goods—If and when open.

In a case where circumstances are sought to be shown that the advance paid by a vendor in respect of a contract of sale is in the nature of a deposit liable to forfeiture if he breaks the contract, there must be conclusive and unambiguous evidence that the buyer broke the contract before the seller is entitled to enforce forfeiture by being permitted to retain the advance.

Mr. *M. Ramachandran* for Petr.

Mr. *V. S. Rangaswami Ayyangar* for Respt.

V. C. S. ——

15—3—1955. C. R. P. No. 2231 of 1952.

Ramaswami, J.

Gangayya *v.* Sait Motoomul Lal Chand.

C. P. C. Ss. 152 and 151 and O. 21, R. 50—Decree against a firm of partnership — Application by one of the partners for amending the decree —Allegation that he was not personally served — Restriction of the operation of the decree to the assets of the partnership—If permissible.

In a suit against a firm of partnership, one of the partners authorised the appearance of Counsel for the defendant firm and a decree was passed. Subsequently another partner filed an application contending that inasmuch as he was not personally served with a summons in the suit and the decree was passed against him also without restricting its operation to the assets of the partnership and making him personally liable along with the other defendants, the decree should be amended under Ss. 151 and 152 or O. 21, R. 50, C. P. C. ;

Held; the said provisions would not apply to such a case and the decree is not liable to be amended.

(1955) 1 M. L. J. 172 : Followed.

Messrs. *D. R Krishna Rao* and *A. Jagannatha Rao* for Petr.

Mr. *N. Ramanatha Ayyar* for Respt.

V. C. S. ——

16—3—1955. S. A. No. 732 of 1953.

Krishnaswami Nayudu, J.

Rajagopala Chettiar *v.* Rangaswami Chettiar.

Hindu Law—Adoption—Authority to adopt by husband—Step mother giving the boy in adoption acting on that authority—Validity of the adoption—Adoption of an orphan.

Where an adoption was made of an orphan, the boy's mother having died during the life time of the father and his father not being alive on the date of the adoption but having given authority to his second wife during his life time, that is, the step mother of the boy, to give the boy in adoption and in pursuance of that authority the boy was given in adoption by the step mother,

Held : though it is well established that apart from the parents no other person has got a right to give a boy in adoption, not even the step mother, where the father who had the authority to give the sanction had given the same to his wife while he was alive and the boy was actually given in adoption by the step mother in pursuance of such authority, such an adoption would be valid.

Mayne's Hindu Law, P. 227 relied on.

Mr. *R. Ramasubba Ayyar* for Appt.

Messrs. *K. S. Desikan, T. T. Srinivasan* and *A. N. Rangaswami* for Respts.

V. C. S. ——

16—3—1955. T. R. C. No. 367 of 1953.

Rajagopalan ann Rajagopala Ayyangar, JJ.

William Jacks and Co. *v.* State of Madras.

Madras General Sales Tax Act (IX of 1939) S. 3 (2) (viii)— Electrical goods — Definition—Scope—Words and Phrases.

The Madras General Sales Tax Act does not define what are electrical goods while it provides for additional tax in respect of such goods under S. 3 (2) (viii). The test that may be applied for the determination of such goods may be stated that only such articles the use of which cannot be had except with the application of electrical energy, can be termed electrical goods or appliances. The words in the section following the expression 'electrical good's, namely, "including Fans and Bulbs" are only illustrative and not exhaustive in their scope.

A double ended grinding machine which is nothing more than an electrical motor, at either end of the shaft of which grinding

wheels are fitted for sharpening tools is nothing more than an electric motor and the grinding wheels form part of the shaft of the motor, and as it cannot be worked except with the use of electricity it must be regarded as 'electrical goods.'

Where a pump section is attached to an electric motor and it is found that in the case of those pumps there is no provision to drive them by any alternative power supply, such goods would fall within the expression 'electrical goods'.

For purposes of taxation, unity of the goods sold should not be impaired and if the machine taken as a whole would not fall within the category of electrical goods, a component part thereof which is not sold as an independent item of goods could not be treated as electrical goods, as such a fictional sale would not furnish any basis for a computation of the taxable turnover.

Mr. *V. Ramakrishna Sastry* for Messrs. *King and Partridge* for Petr.

Mr. *S. Ramanujam* for *The Asst. Govt. Pleader* for the State.

V. C. S. ——

17—3—1955. C. R. P. No. 1318 of 1954.

Mack, J.

Syed Bhadralam Uhani *v.* Syed Mohammed Shasali.

C. P. C., O. 8-A—Applicability to a suit subsequent to the passing of the preliminary decree.

In a partition suit in which a preliminary decree has been passed, it must be deemed that the suit is still pending until the passing of the final decree (67, I.A. 11); therefore the procedure under O. 8-A would be applicable to such cases before the passing of the final decree.

Mr. *S. Ramachandra Ayyar* for Petr.

Mr. *G. R. Jagadisan* for Respt.

V. C. S. ——

17—3—1955. C. R. Ps. Nos. 1556 and 1557 of 1954.

Mack, J.

Paul F. Pereira *v.* Mrs. Kalyani Bai.

Madras Buildings (Lease and Rent) Control Act (XXV of 1949) S. 7 (2) (b)—Use of premises for purpose other than that for which it was let—What constitutes—Wilful default—Definition—Scope.

Where a premises was taken on lease for running a shop and the tenant used to live and sleep in the same premises, the mere fact that in order to guard and protect the articles kept in the shop he remains there would not justify an inference that it was put to a different purpose other than that for which it was leased.

The mere description of a premises as a "shop-building" would not justify the inference that it was let only for the purpose of running a shop.

The ordinary dictionary meaning of the word 'wilful' is "intentional, deliberate, due to perversity or self-will." If a tenant makes default in payment of rent for the simple reason that he does not get the money for payment of rent and delays the payment by a few days on this ground, it is certainly not a case of wilful default but is one which deserves sympathetic condonation by a Court.

Mr. *T. Krishna Rao* for Petr.

Mr. *A. Narayana Pai* for Respt.

V. C. S. ——

22—3—1955. C. R. P. No. 4 of 1953.

Ramaswami, J.

Suryanarayana Iyer *v.* Sheik Dawood Rowther.

Indian Stamp Act, S. 69 (b)—Selling or offering for sale—What constitutes—Use of stamp which is purchased through another—Not an offence.

It is quite true that S. 69 (b) of the Indian Stamp Act lays down that any person not appointed to sell stamps and who sells or offers for sale any stamp (other than a one-anna or half an anna adhesive stamp) shall be punishable with imprisonment or with fine, or with both. But there is no provision of law which prevents the use of a stamp by a person who purchased it through another though the name of the person who paid the money to the vendor, alone appears on the stamp.

The object of that section is to prevent a private market in stamp papers which would result in stamp-papers being dealt with by unauthorised persons not subject to the elaborate rules prescribed by the Government for maintenance of accounts and checking of the stamps, etc., as in the case of regular licensed stamp vendors and to prevent the coming into existence forged and fabricated documents. The Stamp Act has also provided for refund of the amounts when stamp-papers purchased are no longer required to be used. This does not mean however that in cases when a person pays for stamps purchased through another the transaction should immediately be construed as hit at by S. 23 of the Indian Contract Act. Penal provisions of this nature should be construed strictly and the elastic terms" forbidden by law" or "if permitted would defeat the provision of law" should also be kept within legitimate limits as has been repeatedly emphasised in several leading decisions.

Mr. *T. S. Kuppuswami Ayyar* for Petr.

Mr. *T. R. Ramachandran* for Respt.

V. C. S. ——

23—3—1955. S. A. No. 627 of 1951.

Govinda Menon, J.

Mohammed *v.* Mohammed.

Malabar Law—Application in the name of several persons—Presumption as to acquisition on behalf of a tavazhi—Mere omission of the name of the mother from the deed—Applicability of the rule.

When a father following the Marumakkathayam Law acquires a property in the name of his wife or children alone or in the name of his wife and children, the presumption is that the acquisition was for and on behalf of the tavazhi (13 Mad. 317). So also it can be presumed that where the original acquisition was made by several members, though the name of the mother had been omitted *eo nomine* from the deed of acquisition, still the rule as to presumption that the acquisition was for and on behalf of the tavazhi would apply.

Mr. *A. Achuthan Nambiar* for Appt.

Messrs. *T. R. Sangameswara Ayyar, C. K. Viswanatha Ayyar* and *M. R. Krishnan* for Respts.

V. C. S. ——

24—3—1955. W. P. No. 906 of 1953.

Rajagopalan, J.

P. G. Brookes Receiver of the property of M.E.T. *v.* Corporation of Madras.

City Municipal Act (IV of 1919), S. 116 (1) —Tax on carriages—Exemption to persons 'keeping' carriages for sale—Scope—Necessity to be a 'carriage-maker' or a 'dealer for' claiming the exemption.

The only person who 'keeps' carriages for sale that is exempted from paying tax under S. 116 (1) of the City Municipal Act is a carriage-maker or a dealer and merely keeping a carriage for sale may not enable a person to invoke the exemption provided for in the section. 40 Mad. 545 referred to.

Mr. *O T.G. Nambiar* instructed by Messrs. *King and Partridge* for Petr.

Dr. *V. K. Jhon* and Mr. *A. D'Souza* for Messrs. *John and Rao* for Respt.

V. C. S. ——

28—3—1955. C.R.P. No. 1648 of 1954

Ramaswami, J.

T. R. V. Raman *v.* Kasiramani.

Madras Indebted Agriculturists Temporary Relief Act (V of 1954) Ss. 3 and 4—Agriculturist, who is—Meaning of 'land'—Vacant site, not included.

Where in an application for stay under Act V of 1954 the evidence shows that the land in question is a vacant site and appurtenant to a residental building and was purchased as a house site situate between 2 streets with a number of houses all round and assessed by the Municipality as house site, the petitioner cannot be said to be an agriculturist entitled to the benefit of the Act. The fact that there are fruit bearing trees and that to keep the land in good condition water is taken from a *vaikal* and that the owner cultivates vegetables and cocoanuts would not make the vacant site any the less a vacant site.

Mr. *V. C. Viraraghavan* for Petr.

Mr. *N. Sivamani* for Respt.

V. C. S. ——

28—3—1955. C. R. P. No. 1478 of 1954.

Ramaswami, J.

Guruvayur Devaswom Trustees *v.* Krishna Nambudripad.

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), Ss. 49 and 93, and C.P.C., S. 9—Suit by a dismissed employee questioning the order of dismissal and for damages—Bar of civil Court's jurisdiction—Scope.

Where a dismissed employee of a Devaswom brought a suit in the civil Court contending that the order terminating his services was illegal, void and inoperative for reasons that no charges were framed against him and that he was not given an opportunity to explain the charges against him and for damages,, on the question whether the Court would have jurisdiction;

Held: this is the case of a person who feels aggrieved that he has been arbitarily dismissed and in violation of the principles of natural justice and for whom the redress of his grievances is provided for under the Act. The Act provides for a hierarchy of tribunals to hear the appeals from such dismissal orders. It is only if those special tribunals prescribed by the legislature for redressing these grievances fail to comply with the provisions of the Act or do not act in conformity with the fundamental principles of judicial procedure, there can be recourse to the civil Court. The mere fact that a claim for damage has been added in order to clothe the civil Court with jurisdiction—as this is a relief which cannot be granted by the tribunals provided under the Act—would not enlarge the rights of the plaintiff and enable him to approach the civil Court direct. The question of damages would only arise if the dismissal is found to be arbitrary, capricious, *mala fide* and *ultra vires*.

Case-Law-Considered.

Mr. *V. P. Gopalan Nambiar* for Petr.

Mr. *Ravi Varma* for Respt.

V. C. S. ——

29—3—1955. S. A. No. 640 of 1951.

Govinda Menon, J.

Duraiswami Pillai *v.* Kulandaivelu Pillai.

Specific preformance—Recital in a document that sale will be completed in 2 months—Agreement to get the document executed jointly by the mother as guardian of minors — Superfluous clause—Impossibility of performance—Enforceability of the agreement.

Where a person executed a varthamanam agreeing to sell a certain property and get the sale deed completed within 2 months from that date and further stating that the vendor would get the agreement executed jointly by his mother also as guardian of the minors and give it to the plaintiff, it was contended that the document was incapable of specific performance and could not be enforced;

Held : in view of the finding that the vendor was the *kartha* of the family and was competent to act on behalf of the joint family consisting of minors there is no question of the mother joining in the transaction especially as the sale deed was for the discharge of antecedent debts binding on the family. The clause regarding the joining of the mother in the sale deed was only an abundant caution and not an integral part of the contract which is therefore specifically enforceable, leaving apart that clause.

Mr. *K. S. Naidu* for Appt.

Mr. *T. S. Kuppuswami Ayyar* for Respts.

V. C. S. ——

30—3—1955. C. M. P. No. 1928 of 1955 in O. S. A. No. 47 of 1949.

Govinda Menon and *Panchapakesa Iyer, JJ.*

Mahadevi Gurukkal *v.* Commissioner to the H. R. E. Board

C. P. C., S. 114—Review—Discovery of additional evidence—Permissibility—Madras Hindu Religious Endowments Act, S 9 (12)—Public temple—Definition of—Evidence—Use of the temple by the public as of right—Express or implied dedication—Inference—Permissibility.

Where subsequent to the disposal of an appeal an application for review of the judgment was filed alleging that new and important documents have been discovered by the appellant which would have an important bearing on the decision of the appeal, which decided that a temple was not a public temple under S. 9 (12) of the Act,

Held: the new documents could be admitted and it would be a fit case for allowing the review application on the ground of discovery of new evidence. The Court would not be called upon to see in such a case that the evidence if believed, would be conclusive but simply would have to be satisfied that the new evidence was *prima facie* important and fit to be considered.

It is obvious that a temple which began as a private temple may, in course of time, become a public temple by *express or implied* dedication, the latter being proved by use of the temple by the Hindu public *as of right* and without taking any permission from any one. It must be noted that in S. 9 (12) the word used before the phrase "used as of right by the Hindu community or a section thereof as a place of religious worship" is "or" and not "and" thereby showing that express dedication is unnecessary to be proved where it is proved that the temple is used as of right by the Hindu community or any section thereof.

No such express dedication on a definite date need be proved, if it is proved beyond all doubt that the temple has been used as of right by the Hindu public as a place of religious worship without taking anybody's permission, leading to an irresistible inference of *implied dedication.*

Messrs. *V. Thyagarajan* and *T. Aravamuda Ayyangar* for Petr.

The Government Pleader on behalf of the State.

V. C. S. ——

31—3—1955. S. C. C. M. P. No. 285 of 1955.

Rajamannar, C. J. and Rajagopala Ayyangar, J.

Omarssalai Mohammed Sait *v.* Commissioner of Income Tax.

Constitution of India, Arts. 133 (1) (a) (c) and 135 and C. P. C., Ss. 109 and 110 — Appeal to Supreme Court — Application under S. 66 (2) of the Income tax Act — Appeal against, to the Supreme Court — Non-maintainability.

No apppeal lies to the Supreme Court against an order made by the High Court on an application under S. 66 (2) of the Income-tax Act for a direction to the Income-tax Tribunal to state a case and refer the question of law to the High Court.

19 I. T. R. 118 (S.C.) and 9 I. T. R. 246 : Followed.

I. L. R. 12 Lah. 166 : No longer good law.

Mr. *S. Swaminathan* for Petr.

Mr. *C. S. Rama Rao Sahib* for Respt.

V. C. S. ——

SUMMARY OF RECENT CASES.

9–3–1955. Appeal No. 47 of 1952.

Rajagopalan, J.

Estate A. Raghavachari *v.* Ramanujam.

Hindu Law—Partition — Continuation of management of properties by father under an earlier compromise decree— Liability to account — Non-availability of the plea as *kartha* of joint family regarding accounting— Contractual nature — Provision for sanction of loans by Court — Failure to obtain before contracting the same by the father—Liability of sons to pay their share of debts incurred in the course of management—Maintenance — Provision for — No rights to the wife of a coparcener.

In a suit for partition by a Hindu against his father who had already become divided in status but had continued to be in management of the properties in pursuance of a prior compromise decree which provided that they were divided in status thenceforward the father contended with reference to the plaintiff's claim for account of the management of the properties that be was not liable to be called upon to account for the income of the properties as he really retained the property as the manager or kartha of the family;

Held: after the disruption of the joint family which had consisted of the father, first defendant and his two sons, the rights and liabilities of the father were really contractual and governed solely by the terms of the compromise decree. It could not be said to be a case of a re-union of the divided members of the erstwhile coparcenary. The father could not claim to be the kartha of a non-existent joint family and therefore he would be liable to render an account of the management of the properties by him. 35 M. L. J. 96 : Ref. to.

Though one of the terms in such compromise decree had specifically provided that sanction of the Court should be sought for any loan contracted by the first defendant (father), and the father had not sought the sanction of the Court before contracting the loans, the claim of the father in this partition suit that his sons also were bound to discharge from out of their shares in the family properties their shares of the debts he had contracted in the course of the management of the estate cannot be dismissed on the short ground that the father had not obtained sanction of the Court before he contracted the debts.

1906 (1) Ch. 497 Followed. 12 I.C. 780, 70 M.L.J. 282 and 1936 M W.N. 222 Ref. to.

The question, whether in a partition, even with a disruption of the joint family antecedent to the claim for partition, separate provision could be made for the maintenance of a coparcener's wife is devoid of authority. But there is no principle on which separate maintenance could be provided for a coparcener's wife when the properties of the family are partitioned. Unlike a widow, or for the matter of that an unmarried daughter, a wife of a coparcener cannot always claim of right provision for separate maintenance. No doubt a Hindu wife has a limited right of separate maintenance enforceable against her husband. But that right is not one which can be enforced against a coparcenary of which the husband is or was a member. The fact that the share of even an undivided coparcener could be charged with liability for providing for the separate maintenance of the wife is not on the footing that the coparcenary is liable for the separate maintenance of the wife of a coparcener.

Messrs. *K. S. Ramamurthi* and *K. Hariharan* for Appt.

Mr. *R. Gopalaswami Ayyangar* for Respt.

V. C. S. ——

17–3–1955. S. A. No. 349 of 1953.

Krishnaswami Nayudu, J.

Raman Nair *v.* Cherriyamma.

Malabar Law—Puthravasakam Tavazhi—Gift to individuals or to the tavazhi — Construction—Principles.

It is the recognised rule of law that where a person governed by the Marumukkathayam law makes a gift in the name of his wife and children or children alone then the presumption is that the donees took the properties with the incidents of tarwad properties.

Appeal dismissed.

39 Mad. 317 and 1953 (2) M. L. J. 545, Followed.

1941 (2) M. L. J. 287 : Referred to.

Mr. *D. A. Krishna Variar* for Appt.

Messrs. *V. P. Gopalan Nambiar* and *K. Sridhara Menon* for Respts.

V. C. S. ——

18–3–1955. S. A. No. 277 of 1953

Krishnaswamy Nayudu, J.

Puttamma Shedthi *v.* Deju Shetty.

Malabar Law—Aliyasanthana Family — Gift to a person or a tavazhi—Presumption —Scope.

Where a woman of the Aliyasanthana family made a gift of certain items of property to her daughter-in law the document of gift reciting that the donee had at the time of the sickness of the donor been of assistance to her, and attended to her comforts and that the donee's children shall be the persons that would have full right and title and that herself and her children shall enjoy hereditarily without let or hindrance from the donor, her heirs or representatives, and it was found that the recital as to the attending to the needs of the donor was not correct on the evidence;

Held : as the donee was the *de jure ejamanthi* of the larger Aliyasanthana family on that date, it would not be unreasonable to hold that when the mother-in-law transferred the property by way of gift to the daughter-in-law she intended that herself and her children should be benefited by it. Ordinarily, one would understand the reference to the donee and her children as a term of art, but its interpretation depends on the circumstances of the particular case.

It is not usual for a mother-in-law to make a gift to the daughter-in-law for her sole benefit, especially when she has grandsons through her. Ordinarily, one would come across gifts by a mother to her daughter and not by a mother-in-law to her daughter-in-law as their relationship except in exceptional cases is not cordial, and there is no reason to think that the position is different in so far as people in South Kanara are concerned.

16 Mad. 201, 39 Mad. 317, I. L. R. 1947 Mad. 272 : Referred to.

Appeal dismissed.

Mr. *T. Krishna Rao* for Appts.

Messrs. *S. Ramayya Nayak* and *A. Jagannatha Rao* for Respt.

V. C. S. ———

18—3—1955. A. A. A. O. No. 86 of 1950

Mack, J.

Ramankutti Panicker *v.* Thirupatha Munda Deva Swami.

Madras Agriculturists Relief (Amendment) Act (V of 1949) S. 3 and S. 17 (A)—Scope.

It is clear from S. 3 of the Madras Agriculturists Relief (Amendment) Act, 1949, that it applies to all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of that Act, and that a decree though passed prior to the enactment of S. 17 (A) would be liable to be scaled down as in the case of a decree under the provisions of the Act. There is no difference in this matter between a decree for debt and one for arrears of rent.

Mr. *C. S. Swaminathan* for Appt.

Mr. *D. A. Krishna Variar* for Respt.

V. C. S. ——

21—3—1955. S. A. No. 715 of 1951

Govinda Menon, J.

Ramachandra Iyer *v.* Kuppuswami Iyengar.

Hindu Law — Widow—Alienation—Consent of reversioner to the alienation—Binding nature.

A Hindu reversioner who for consideration consents to future alienations in general being made by a Hindu widow is estopped from questioning any alienation made by her thereafter.

56 M.L.J. 66 and 23 M.L.J. 63 Followed.

54 Indian Appeals 396 considered.

52 Madras 556 Referred to.

Mr. *T. Krishna Rao* for Appts.

Messrs. *K. S. Desikan* and *K. Raman* for Respts.

V. C. S. ———

21—3—1955. W. P. No. 232 of 1955.

Rajagopalan, J.

Muthian and others—Petitioners.

Tanjore Tenants and Pannaiyals (Protection) Act, XIV of 1952, S. 8 (2) and R. 7—Gross produce of the land—Year of normal water supply—Determination.

S. 8 (2) of the Tanjore Tenants and Pannaiyals (Protection) Act itself does not specify the year with reference to which the normal gross produce should be assessed. A dispute about the payment of the rent fixed in kind, that is, whether it constitutes the fair rent can arise at any time during the period of statutory tenancy and when such a dispute arises it has to be determined in accordance with the provisions of S. 8 (2) of the Act and R. 7. It cannot be contended that the Revenue Court has no jurisdiction to take any year within the period of the statutory tenancy as the year for assessing the normal gross produce. Neither S. 8 nor R. 7, prescribes even impliedly that what is the normal year must be considered with reference to the period anterior to the commencement of the statutory tenancy.

Mr. *V. Venkataranan* for Petrs.

V. C. S. ——

22—3—1955 L. P. A. No. 187 of 1952.

Rajamannar, C. J. and *Somasundaram, J.*

Keloth Valin Chiyan Kunhambu *v.* Nambudiri.

Madras Agriculturists Relief Act (IV of of 1938), S. 25—Effect—Malabar Tenancy Act, (Madras Act, VII of 1954), S. 25—Validity—Scope.

The effect of S. 25 of the Madras Agriculturists Relief Act is only to safeguard the rights of the creditor and so long as such rights are not adversely affected and he himself could not claim any title to the suit properties, the only right which he had being the right of a mortgagee which would not be affected by an assignment, the alienation itself would not be void as between the parties.

S. 25 of the Malabar Tenancy Act, VII of 1954, giving retrospective effect to the provisions of the Amending Act is valid and will be applicable to an appeal which is pending at the time of its enactment.

67 L. W. 719 Approved.

Appeal allowed with modifications.

Mr. *M. C. Sridharan* for Appt.

Mr. *S. Venkatachala Sastri* for Respt.

V. C. S. ——

22—3—1955. S. A. 528 of 1951.

Govinda Menon, J.

Chidambara Swami Temple *v.* Krishna Reddy.

Madras Hindu Religious Endowments Act, S. 73—Suit by trustee of an institution for removal of the trustee of a specific endowment—Non-maintainability—Suit for recovery of money spent—Maintainability—Contract Act, Ss. 69 and 70.

Where the prayer in a plaint in a suit instituted by the trustee of a temple against the trustee of a specific endowment was that the first defendant should be compelled to surrender the endowed properties to the plaintiff on the ground of his non-performance of the pooja thus resulting in the removal of the first defendant from the trusteeship of the endowed properties, the suit on that relief would not be maintainable due to the provisions of S. 73 of the Madras Hindu Religious Endowments Act, for when once the properties are delivered over to the temple the defendant can have no manner of right or possession and the trusteeship granted to him thereby goes.

When a general trustee of a temple files a suit for recoupment of sums of money due to the trustee for having got the ceremonies performed which any one else was bound to do, it cannot be said that there is any

prohibition for such a suit under S. 73 of the Hindu Religious Endowments Act. It is a suit which can be justified under Ss. 69 and 70-A of the Contract.

Mr. *M. S. Venkatarama Ayyar* for Appt.

Mr. *S. V. Venugopalachariar* for Respt.

V. C. S. ——

23—3—1955. S. A. No. 147 of 1949.

Govinda Menon, J.

Nallamangai Ammal *v.* Ariyamkaru Pillai.

Decree—Joint and several decree—Several judgment debtors—Apportionment if, permissible.

It is not open to one or more of judgment debtors against whom and others a joint and several decree for a sum of money has been passed liable to be realised by sale of certain property, to apportion an *aliquot* share of the decree so far as they are concerned and claim to be absolved from the whole decree.

Held: on the facts that the principle relating to the restriction of a part of the decree in appeal is not applicable.

58 M. L. J. 343, 38 Mad. 18, 1943 (I) M.L.J. 325, 29 Mad. 333 and 67 M.L.J. 364 Ref. to.

Appeal dismissed.

Mr. *S. Ramachandra Ayyar* for Appt.

Messrs. *S. T. Srinivasagopalachari* and *V. Meenakshisundaram* for Respt.

V. C. S. ——

28—3—1955. Case Refd. No. 100 of 1954.

Rajamannar, C. J., Rajagopalan and Rajagopala Ayyangar, JJ.

The Board of Revenue, The Chief Controlling Revenue Authority *v.* Sri Shanmughar Mills, Ltd.

Indian Stamp Act, Sch. I-A, Art. 5—Scope—Mere letter reciting earlier deposit of title deeds—Non-liability to stamp.

Before any document can be brought within the scope of Art. 5 of Sch. I-A of the Stamp Act, it must be established that the said document is an instrument evidencing an agreement relating to the deposit of title deeds. It is not sufficient that the document contains a reference to a deposit of title deeds. The document must itself be evidence of an agreement relating to the deposit of title deeds that is to say the deposit of title deeds must be made in and by the document itself. Where the language of a letter unambiguously referred to a completed transaction of title deeds in terms already agreed upon and they were not deposited along with that letter, it is in the nature of a mere memorandum to which a list of titled deeds already deposited is attached and Art. 5 of Sch. I-A to the Stamp Act is not attracted to such a document.

Reference answered.

The Government Pleader on behalf of the Referring Authority.

Mr. *A. R. Krishnasami* for Respt.

V. C. S. ——

29—3—1955. S. A. No. 623 of 1950 etc.

Govinda Menon, J.

Natesa Iyer *v.* Muthuramalinga Iyer.

Limitation — Adverse Possession — One co-owner transferring all rights to another —If and when constitutes adverse possession as against others.

Whenever a co-owner transfers whatever rights he has in the property, it includes the joint possession which he has and the remaining co-owner if he wants to hold the property adversely to the purchaser, must show acts of ouster and mere passive possession would not amount to acts of ouster.

1912 A. C. 230, 1943, Mad. 15, 12 Mad. 292 and 11 L. W. 31 Ref. to.

Appeal dismissed.

Messrs. *A. V. Narayanaswami, R. Venkatachalam* and *B.V. Viswanatha Ayyar* for Appts.

Messrs. *K. S. Desikan* and *K. Raman* for Respt.

V. C. S. ——

31—3—1955. O. S. A. No. 26 of 1954.

Rajamannar, C. J., and Rajagopala Iyengar, J.

Danalakshmi Bank *v.* Kutti Sankara Menon.

Bankruptcy—Transaction alleged to be a fradulent preference—Involuntary nature—Establishment of—Practice—Witness speaking to facts stated by him in an affidavit—Party calling him as witness seeking to cross-examine him and treat him as hostile —Not permissible.

Fraudulent preference of a transaction which is sought to be set aside in bankruptcy proceedings, as its very name implies, posits the existence of free will on the part of the insolvent to prefer one creditor to another.

Where on the findings the only conclusion possible to arrive at in a case is that the act of execution of the impugned mortgage by the insolvent was not voluntary but was only on the existence of and pressure brought by the creditors (Directors of the bank) there could be no question of its being attached as a fraudulent preference.

When a party calls a witness to speak to certain facts and knew what the witness was going to depose, about which there could be no doubt because the witness himself had filed a counter affidavit stating those facts, it will not be permissible to the applicant who called the party, to seek permission to put to the witness records of previous deposition for the purpose of contradicting him. This could be allowed only as a part of cross examination of witnesses; and notwithstanding that the evidence recorded at the public examination may be admissible and relevant in the circumstances in the sense of the possibility of its being put to a witness in an appropriate case, still the Court may refuse to allow the party who called the witness to cross examine him and treat him as hostile.

Mr. *T. R. Ramachandran* for Appt.

Messrs. *V. Thyagarajan, A. Balasubramaniam* and *V. P. Gopalan Nambiar* for Respt.

V. C. S. ——

31-3—1955. Writ Appeal No. 7 of 1955.

Rajamannar C. J. and *Somasundaram, J.*

Subbayya Udayar *v.* Revenue Court, Tanjore.

Tanjore Tenants and Pannaiyals Protection Act, (Madras Act XIV of 1952) S. 10 (2) (c) — Scope —Order for eviction—30 days' time for payment of arrears—Necessity.

In respect of a petition for eviction filed under the Tanjore Tenants and Pannaiyals Protection Act on the ground that the tenant had failed to pay the rent, if any objection is taken by the tenant to the rate of rent claimed, or liability is denied on any other ground, it is the duty of the Revenue Court to inquire into the matter and give its decision. There are two stages in the disposal of an application for eviction on the ground of non-payment of rent. The first stage is an inquiry into the objections raised on behalf of the tenant, followed by a decision by the Revenue Court. If the decision is against the land owner, the application is dismissed straightaway. But if the decision is in favour of the landowner, a notice is issued calling upon the tenant to tender the rent in arrear and costs. Then, we get the next stage after the expiry of thirty days from the date of the notice. If by that date, the tenant does not comply with the notice, that is, does not pay up the arrears of rent and costs, the Revenue Court shall pass an order for his eviction.

An order of eviction passed by the Revenue Court in disregard of the provisions of S. 10 (2) (c) of the Act would be liable to be quashed by the High Court in an application under Art. 226 of the Constitution.

Mr. *K. S. Naidu* for Appt.

The Spl. Govt. Pleader and Mr. *S. Ramachandra Ayyar* for Respts.

V. C. S. ——

7—4—1955. W. A. No. 35 of of 1955.

Rajamannar C. J. and *Somasundaram, J.*

Tanjore Motor Trades Ltd. *v.* Narayanaswami Naidu.

Constitution of India, Art. 226—Certiorari — Decision of quasi judicial tribunal — Reliance on evidence contained in documents—Failure to disclose contents and source to the party against whom order is passed — Illegality — Interference by the High Court—Permissibility.

In respect of a permit to ply a bus on a particular route the petitioner before the High Court was selected by the Regional Transport Authority. The other applicants appealed to the Central Road Traffic Board who set aside the order of the R. T. A. and granted the same to the first respondent on the ground amongst others that he had a workshop at one end of the route. The petitioner thereupon applied to the Government for interference under S. 64-A wherein he challenged the correctness of the finding and asserted that the first defendant had no workshop anywhere and requested the Government to call for a report on this question from the R. T. A. The Government sent a copy of this petition to the first respondent who sent a written representation to the Government in reply stating that he had a workshop and supported his statement by 3 documents. The Government furnished the petitioner on his application with a copy of the first respondent's representation but declined his request for copies of the documents and later on passed an rejecting the revision application of the petitioner. It was contended in this application to quash the said order under Art. 226 of the Constitution that the Government had denied to the petitioner a real and effective opportunity to meet the case of the first respondent by declining to grant the copies of the documents ;

Held : it would be improper for a tribunal acting in a quasi-judicial capacity to consider and give weight to evidence contained in documents the source and contents of which were not divulged to the party against whom the order was passed by the tribunal.

1945 All E. R. Vol. II, p. 131, Followed.

When more than one reasons are given and when one of them which from the language of the order appears to be substantial has been taken into consideration, it is impossible for the Court to sustain the order on the ground that it was really the valid reason that effectively operated to bring about the decision and not the invalid one,

1920 A. C. 735 followed ; Decision of Rajagopala Iyengar J. in W. P. 779 and 780 of 1952 approved.

Mr. *M.K. Nambiar* for Mr. *G. R. Jagadisan* for Appt.

Messrs. *K. V. Venkatasubramania Iyer*, *T. Chengalvaroyan* and *K. Thirumalai* for 1st Respt.

The Special Government Pleader on behalf of the State, the 2nd and 3rd Respts.

V. C. S. ——

15—4—1955. S. R. Nos. 3321 and 7243 of 1955.

Rajamannar C.J., Balakrishna Iyer and Rajagopala Iyengar, JJ.

A. C. S. Chari *v.* The Advocate General.

Constitution of India, Arts. 133 and 135—Order of High Court suspending a vakil from practising—Appeal to the Supreme Court—Non-maintainability.

An appeal does not lie to the Supreme Court under Art. 133 or 135 of the Constitution against an order passed by the High Court suspending a vakil from practising. 42 M. L. J. 332 Followed.

Mr. *K. Sankara Iyer* for Petr.

The Advocate General for Respt.

V. C. S. ——

15—4—1955 C. R. P. No. 719 of 1953.

Somasundaram, J.

Viswanatha Mudaliar *v.* Kanniappa Mudaliar.

C. P. C., O. 20, R. 11 and Limitation Act, Art. 175—Application by judgment debtor for permission to pay instalments—Period of limitation.

An application for an order relating to payment by instalments should be made at the time of the passing of the decree under the provisions of O. 20, R. 11. If it is not done then, it must be made on an application by the judgment debtor within six months from the date of decree under Art. 175 of the Limitation Act. The Court could not order payment of instalments otherwise.

Mr. *G. R. Jagadisan* for Petr.

V. C. S. ——

UNIFORM CIVIL CODE FOR INDIA

Its scope and practicability.

(By Sri N. R. R.)

Modern State and Uniform Civil Code

Every State which has any claim to civilised jurisprudence has or aims to have a uniform Civil Code to govern its citizens. Such a Code is the rage of the times and the fashion of modern democracies. Be the type the American, the European or the Asiatic, every enlightened Government seeks to simplify and synthesise its laws of person and property into a pattern of uniformity and harmony which can stand the test of time and satisfy the demands of justice. Even countries like Egypt and Turkey whose inhabitants could till recently be said to have been rather fanatically attached to the precepts of Islam and the crude customs and conventions of their forbears, shook themselves free from the shackles of religious conservatism, and emulated the more progressive nations of the West in changing and shaping their laws in conformity with modern ideas and ideals. In the far East, Japan manifested a phenomenal readiness to imbibe the western notions of Statecraft and Government, and moulding and modelling its laws with reference to progressive principles of the West, it is now in a position to boast of a uniform Code of civil laws which has done away with discriminations and differences having its justification on the fundamentals of justice or the needs of the Nation as a whole. Viewed in this globular context it was proper and fitting that the framers of the Indian Constitution have set down as one of the directive principles the enactment of a uniform Civil Code for the whole of India in Art. 44 of the Constitution as follows: "The State shall endeavour to secure for the citizens a uniform Civil Code throughout the territory of India."

Advantages of a uniform Civil Code.

The advantages that flow from having a uniform Civil Code for the whole Nation are obvious and manifold. In a country like India which during a succession of centuries had come to be the home of numerous communities of different races, creeds and culture, the population now consists of heterogenous sections whose personal laws, religion and sentiments are so very divergent that unless every attempt is made strenuously and at once to discover and emphasise the points of agreement between them, the gulf that divides each section from every other may in the long run become so unbridgeable that the fond hope of many of the leaders for establishing a coherent and consolidated nation will become a forlorn one. It requires little reflection to concede that there cannot be a more potent influence in this desirable direction of unifying the nation than the framing and enacting of a uniform Civil Code. Such a measure will accustom the people to think in the terms of one law for all of them and ere long induce them to forget their mutual differences and diversities of custom and community. It will conduce considerably to the reduction of litigations in the country, the enormous volume of which as it obtains today is due mainly to divergent laws governing the various communities and castes and the different interpretations of the same law in different provinces. To contemplate various personal laws differing from place to place and from the adherence of one religion and another with all their confusions and complexities, worse confounded by the conflicting cases that had sought to interpret them in the past, is not what a true patriot can indulge in with equanimity. Uniformity in Civil Codes have the further advantage of doing away with the anomalies that would otherwise exist between community and community, anomalies operating advantageously to one section of citizens and detrimentally to another section of the citizens. More than all it will develop in the long run a consciousness among the people that they are all one, that they

belong to one nation and that when an emergency arises they should, in the words of Daniel Webster in his address at Birkenhill "think of their country, their whole country and nothing but their country." It is therefore easy to see why every modern State has placed in the forefront of its progressive programme the enactment of a uniform Civil Code as one of its main and major objectives. Such uniformity in the governing law conduces to the consolidation and coherence both in the social and political aspects of citizenship so necessary for the peace and prosperity of the nation. As every one knows, the history of India has been the history of the people torn by internecine and inter-communal strife and differences which has prepared the land as a hot-bed of helotry under foreign dominations. If the subjects of India should rule out the possibility of fresh and further enslavement under a foreign power, no better, no safer and no more sensible method of achieving that aim can be conceived and contrived than by the one visualised in the Article of the Constitution of India above-mentioned.

Favourable Disposition of Enlightened India.

He who runs may read that so far as enlightening public opinion is concerned, it is not altogether against the enactment of a uniform Civil Code. A conservative counsel of caution may be heard here and there, but that such a change is desirable and necessary in the ultimate reckoning is rarely in controversy. This disposition on the part of progressive Indians is but a historical result of the events that landmarked the political march of the country from the ancient times to the present day. "Unity amidst diversity", that sublime teaching of the Upanishads has descended to us from the clouds of the hoary past and resounded through the ages like a solemn refrain to remind the people of the land of their essential oneness despite all the differences of outward forms and features and has lent to the culture of the orient a catholicity of outlook and elasticity of adjustment which can absorb any onslaught without the least shock or disturbance. Here lies the secret of the Hindu civilisation which has survived the truth of time and the vandalism of ages. A Hindu has a religion which can accommodate and inspire all the known religions of the world, he has a philosophy from which any philosophy known and unknown can draw sustenance and support. He has a culture into which can fit in other cultures worth mentioning whether European or Asiatic. The Hindus constitute the majority of the population of the Indian Union, and there is therefore no risk of any sustained opposition from them to a change in their personal law. As regards the Musalmans, and other non-Hindu sections of the population there need have little cause to complain against the uniform Code not only because they are in a minority and therefore for merely placating them the interests of the majority of the nation as such cannot be sacrificed but because any such Civil Code is to be conceived and constructed on foundations of equity and justice and not on principles which may savour of the tyranny of the majority over the minority. Be he a Hindu, a Christian, or a Mahomedan, no citizen of Bharath is to forget that he is an Indian first, last and always, and that if a particular measure is conducive to the common good of the nation he should have no mental reservation in lending his support thereto, thus facilitating the country's march to its destined goal of democratic freedom. For this salutary attitude on his part, he can draw inspiration from several noble and unforgettable lessons in Indian history, such as, the way Emperor Akbar endeavoured to knit together the Musalmans and Hindus into one united nation, the readiness with which the two communities sank their differences and fought shoulder to shoulder against the foreigner during the Indian Mutiny, and the days of the Khilafat and Non-cooperation movements, and the enthusiasm with which the Musalmans of the Indian Union swore their loyalty to the country and struck to the land of their birth unmindful of the blandishments

of Pakistan. After all, it must not be forgotten that except as regards what may appropriately be described as pure personal law, in respect of practically all matters the Indians whatever be their caste, community or creed, are as a matter of fact, governed by one law and a change over of the existing personal law to the new one with such alterations as the needs of justice and the welfare of the nation may demand will not create such a jolt in the consciousness and consciences of the people as to lead to any serious dissatisfaction or hot burnings amongst them. It must be remembered that a uniform Civil Code has necessarily to be a kind of a composite measure embodying the best elements of the personal law of each community or sect and that in such a device there are sure to be counterveiling compensations, so that it cannot be said with any justification that one community or sect has lost or gained everything as against another. After all, no legal institution, Hindu, Islamic or any other, can claim a monopoly of juris-dic wisdom, and hence in the framing of a uniform Civil Law one has to draw the quintessence of every system which has an appeal to the fundamental justice and inject it into the body and life-blood of the Civil Code so that it may combine within itself the richness and vitality of every living jurisprudence. Such a blend will not only avoid the changes of unfair treatment of one community as against another but will impart into the new law the superior merit of conformance to the canons of essential justice and equity. That way lies the harmonious synthesis of the varying doctrines of the divergent laws of the communities in India. That way lies the solution for a uniform Civil Code, a solution which is both necessary and urgent if India is to emerge sooner than later as a power of which we can well be proud and to which the other countries in the world can look up for hope and guidance in the establishment of amity and friendship amidst the clash of arms and the cries of warring Nations.

Criticism based on religion

It is a matter of common knowledge that whenever a reform was proposed in the personal law of the people, however desirable the reform might have been, there were not people wanting to raise the slogan of religion in danger and gather support to their agitation by an appeal to the ignorance and prejudice of the masses, But it is the verdict of history that on every one of those occasions sense ultimately triumphed over sentiment and the opposition soon flagged and faded away. It may be fairly expected that a proposal for a uniform Civil Code will encounter initially some-opposition and hostility but that the measure will finally be accepted as a salutary *fait accompli* is beyond question. In the meantime, however, there would be the usual purblind and pernicious propaganda inspired by agelong sentiments and goaded by religious fanaticism which may try the patience and tax the resources of those in charge of the measure. The situation that may develop out of such opposition will require very delicate, careful and sympathetic handling. Very often the hostilities honest though ill-informed can be easily stilled by sincere and sustained effort to educate the people that the fear of interference with the religions has little justification to support it. It is no doubt true, as Frederick the Great observed, that every man should have an unfettered freedom to choose his own way of going to Heaven; but what has that to do with what the law one may require on earth with reference to his temporal matters here below, for the good of himself aud the happiness of those amongst whom he lives and moves and has his being? How can a law laying down the line of succession different from the one hereto prevailing detract him from what he conceives to be the straight path to Heaven which he has chosen for himself? How does a uniform Civil Code governing, for instance, both Hindus and Muhammadans in matters of personal law, interfere with the religion of the one community or the other or in any innocent or reasonable

way with the adherence of one's religion proposed to placate or propitiate one's Gods or Goddesses. The separation of secular matters from matters of religion should be complete and clear-cut. As was observed by Mr. Justice Rutledge in *Everson* v. *Board of Education* (1) the realm of religious belief remains the kingdom of individual man and his God and should not be confounded with what the Legislature may legitimately take over into the public domain. In the same case Mr. Justice Black points out the necessity for the existence of a wall of separation between the secular affairs of the State and the religious affairs of the citizens. In *Davies* v. *Veason* (2), Mr. Justice Field observes as follows:

"With man's relation to his maker and the obligations he may think they may impose, and the manner in which an expression shall be made by him of his beliefs in these subjects no interference can be permitted, *provided always the laws of society designed to secure its peace and prosperity and the morals of the people are not interfered with*; the proviso underlined which excepts the secular law from the domain of religion is of great significance and shows how the cry of religion in danger as against a salutary secular legislation is nothing but a cry of ignorance and prejudice."

These principles are embodied in Art. 25 of the Constitution of India, which runs as follow:

"(1) Subject to public order, morality and health and the other provisions of this Part all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion: (2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform ...."

This Article merely postulates the freedom of religious belief which is no doubt basic in the soiety of free men, but does not leave to individuals of the communities an absolute right to make final decisions, unassailable by the State as to every thing they will or will not do. Religious faith however honestly held, does not free individuals from responsibility to conduct themselves obediently to laws which are either necessary to protect society as a whole or conducive to its welfare and happiness. *Board of Education* v. *Barnette* (3). In other words, while religion is outside the sphere of political Government this does not mean that all matters to which religious organisations may be connected in the least are outside the sphere of governmental regulation and control. The validity of secular laws cannot be sought to be measured by their conformity to this or that Code of religious doctrine, and since the makers of our Constitution contemplated a secular State and since ecclesiastical doctrine cannot measure legal right or wrong except in a theocratic State which ours is not, the freedom of religion which is vouchsafed to the subject under the above Article cannot be any protection or bar against the State undertaking the legislation in secular matters, though in respect of such matters a particular religion may contain rules or directions for observance and adherence. It is hence clear that a uniform secular law to govern the followers of different religions with reference to purely temporal matters is not open to attack of interference with religion merely because in the scriptural books of any particular religion the distinction between religious and secular incidents are blurred, confused and combined as apparently identical or indivisible.

(To be continued.)

(1) (1947) 310 U.S. 1.
(2) 183 U. S. 333.
(3) 319 U. S. 624.

UNIFORM CIVIL CODE FOR INDIA

Its scope and practicability.

(By Sri N. R. R.)

(Continued from page 64)

Scheme and scope of the Code

The scheme that is to be adopted for framing a uniform Civil Code should as far as possible conform to the basic principles of the existing personal laws so that the changes introduced in those laws may not appear as violent inroads into them. Such a process will tend to dispel the apprehensions of the conservatory sections of the people that the Legislature is out to demolish and destroy their cultural and social background and introduce strange and outlandish innovations which have no root in their age long institutions. When the proverbial unchanging East is made to change, it must be by methods which do not cut away altogether the old moorings but profess to preserve them to the extent possible. Besides, the principles to be imported and grafted into the new code should be so drawn from the divergent systems of existing personal laws that an impression that an undue weightage has been given to one system as against another ought not to be created. Though the usages and customs of India have not stood still and have been growing and changing owing to the impact of outside influences and contacts, there is an instinctive reluctance to sudden innovations, and it therefore behoves the framers of the Civil Code to respect this reluctance to the extent possible and to so adapt the existing laws as to create the least disturbance in them. If from this stand point one examines the main branches of the various personal laws that are now extant in the land of Bharat one may not find it difficult to define and delimit the scope of their applicability as follows:

Applicability :—The Civil Code shall apply to all persons domiciled in Bharat.

Marriage :—The only marriage that is recognised by the Civil Code is a marriage registered before the Registrar of Marriages. The eligibility for marriage is governed by S. 2 of the Civil Marriages Act, and the rules for the dissolution of marriage and divorce between the spouses are the same as those under the Indian Divorce Act.

Adoption :—Every person, whether male or female, is entitled to adopt a boy provided the adoptee has no male issue at the time of the adoption, and the person adopted shall have all the rights of a son born to the adopter. If subsequent to the adoption, a son is born to the adopter, the adoptee will take half the share which he would have taken had he been an aurasa son of the adopter. The adoptee will however not lose his right in his natural family, and except for his right to inherit to his adoptive parent he will be considered for all purposes as if he still remains the member of his natural family. The right to inherit to the adoptive father extends to inheritance to such father's wife provided she was alive at the time of the adoption and has consented to the same. The same rule applies to an adoption by a woman and the boy adopted would inherit to her husband if he has consented to the adoption either at the time of the adoption or before the adoption and that consent has not been previously revoked.

Guardianship:—The existing Hindu law of guardianship applies to every citizen of India, but the rules relating to the position and powers of a *de facto* guardian shall have no operation. No person is entitled to be the legal guardian of a minor except his father and in his absence his mother, except under an appointment by Court, and minority for all purposes extends upto the completion of 18 years of age. The legal guardian is also the guardian for giving the ward in marriage.

Maintenance :—Every person of means is legally bound to maintain his aged parents and minor children who

are not able to help themselves, and a wife is entitled to be maintained by her husband irrespective of his possession of means so long as he is not physically unfit and disabled to earn a living. This right of the wife, the child or the parent to be maintained is not enforceable if the person claiming the maintenance has the means to maintain herself or himself. The other indigent relations have only a moral right to be maintained, which moral right will ripen into a legal one as against the heirs taking the property of the person under the moral obligation to maintain. Immorality and illegitimacy will have no recognition, and neither a concubine nor an illegitimate son will have any status or right in law.

Law of the joint family :—Every person, whether male or female is the absolute owner of the property acquired by him or her by inheritance or any other means and shall hold the same without a right by birth or survivorship to any other relation. Where the property is held at the time of the commencement of the Civil Code by the members of a Mitakshara coparcenary, they shall continue to hold the property as tenants-in-common without the right of survivorship amongst themselves or the right by birth of a future son or coparcener that may subsequently be born into the family. So long as the members of the family continue to hold the property as joint tenants, the relations that govern them *inter se* with reference to such common property shall be the same as those that govern the co-heirs taking the property of a deceased Mahomedan under the Islamic law of inheritance, and an alienation by one of them alone will be binding only on his share except when the alienation has been made by one who is in charge and management of the common property and is for a purpose binding on the entire estate on the ground of necessity as distinguished from the ground of benefit.

Succession :—The rules of succession both testamentary and intestate shall be the same as those prescribed by the Indian Succession Act, and the rules of succession and inheritance now obtaining amongst the Hindus and Mahomedans under their personal laws shall no longer operate.

Effect of the above rules on existing personal laws

There can be no gainsaying that a uniform civil code on the lines above suggested would effect vital and far-reaching changes in the existing personal laws of the people. But having regard to the obvious advantages of such a code, the price is certainly worth paying. At the same time it can be demonstrated without difficulty that the introduction of the changes envisaged in such a Code results in the least interference with the religious sentiments of the people and allows them free scope to satisfy their religious conscience and scruples by sticking to the sacramental features of their pet institutions like marriage and adoption. For instance, though the marriage under the Civil Code is reduced to the status of a civil contract without the trappings of orthodox ceremonials and the paraphernalia of a Hindu, there is nothing to prevent a Hindu conservatively inclined to indulge to his heart's content in the forms and rituals laid down in the scriptures of his religion, and the requirement that the marriage should be registered in the register of marriages is not going to interfere with his ceremonial indulgence. The same thing can be said with reference to the rites and practices of an orthodox adoption. The Civil Code only aims to give a secular turn to these institutions and removes some of the sastraic prohibitions. No Hindu is put under any restraint to ignore, for instance, the bar against sagotra marriage, or against the adoption of a sastraically prohibited boy. There is no penalty imposed under the Civil Code for observing those prohibitions; only what the Code says is that the contravention of the prohibition will not invalidate the act in law.

If one should sum up the gains of the Hindus from the enactment of a uniform Civil Code on the lines adumbrated above it cannot be said

that the advantage derived is inconsiderable. The joint family system with its incidents of survivorship and pious obligation has been found to be ill-suited to modern conditions and is deservedly thrown into oblivion. The confusing principles of inheritance with baffling anomalies of bandhu and stridhana succession give place to a well-tried body of rules embodied in the Indian Succession Act based upon fundamentals of natural affection and justice. And there is the invaluable incident of divorce engrafted into the marriage law, an incident so much clamoured for by the advanced section of Hindu women. And last but not least, the daughters get equal rights with sons, a change much in excess of the favoured position accorded to women in the Islamic law. The doing away with the much criticised woman's estate around which has clustered a large body of confounded case-law and costly litigation is a relief for which the Hindu population cannot be sufficiently thankful. Coming to the next big section of the Indian people, namely the Mahomedans, the reckoning of the advantages gained by them is equally gratifying. Their ill-conceived marriage laws with their indefensible rules for divorce and temporary alliances give place to just and simple rules of marital relations approved and adopted by practically all the civilised nations of the world. And they also gain the institution of adoption which will be welcomed as a desirable displacement of the quaint and not altogether simple institution of acknowledgment of legitimacy. As regards the succession what has been already said with reference thereto in relation to the Hindus applies with greater force and appropriateness to the Mahomedans. It is a matter of common experience with most students how much their mathematical brains must have been exercised over the baffling fractions of the respective shares to be calculated especially when a crowd of remote relations claiming through different collateral branches gather to tear the deceased's estate to shreds. On the whole therefore it is permissible to postulate that even from the point of view of profit to the Mahomedans, the uniform Civil Code on the lines above given must be a welcome measure. And so far as the Christians are concerned it requires little reflection to conclude that they cannot possibly have any grievance, for practically their entire law of testamentary and intestate succession and their laws of marriage and divorce have been adopted into the Civil Code. Hence if in the face of these obvious advantages to all parties concerned by the enactment of a uniform Civil Code on the above lines, there is still some opposition in some quarter, it must be attributed to chronic ignorance and unenlightened sentiment and prejudice which has resolved to shut its eyes to the obvious and has decided not to be convinced.

Practicability of a uniform Civil Code.

From what has been already stated it is clear that there can be little difficulty either in framing a uniform Civil Code which will be acceptable to all the sections of the Indian people or in enforcing its provisions as against them. That such a thing is proper and practicable has been accepted by the entire nation assembled through their accredited representatives in the Constituent Assembly which framed the Constitution of India, as otherwise Art. 44 of the Constitution which says "The State shall endeavour to secure for the citizens a uniform Civil Code throughout the territory of India" will not be there. The foregoing discussion discloses how such a Code is both desirable and necessary at this turning point in our country's history, and that there can possibly be no practical difficulties in inducing the people to accept such a Code as conducive to their own happiness and the consolidation of the Nation as a whole.

Conclusion.

Whatever be the hysterics of argument that misguided zealots against every change may indulge, it is the argument of history that when any country in its onward march to progress reaches a stage when its leaders feel that a change in the law of the

land is necessary for the consolidation and stability of the nation, that change shall be effected and enforced however sustained and stubborn the opposition to it may be. It is that stage that India has reached to-day, and its enlightened leaders whose patriotism and integrity had been tried through the sacrifices and sufferings in their fight against the foreign domination feel that a uniform personal law for the whole of India is both desirable and imperative in the interests of the nation. The foregoing paragraphs have shown how they are right in this feeling and how sense and sanity on the part of the citizens of India should welcome and support such a move and measure. After all, changes in the personal laws were not unknown even to the orthodox Hindus and Mahomedans. The very fact that there are various schools in each jurisprudence, some, more recent and reformatory than others are proof positive that Indians are not constitutionally averse to desirable changes. Why then should there be any apprehension that a uniform personal law will not be welcomed by the people? Besides, the makers of our Constitution have embodied therein certain Articles which prohibit discrimination on the ground of religion, sex, etc., and posit equality before the law. If anything, this is a cogent argument for a uniform Civil Code applicable to all citizens alike, whether they be Mahomedans, Hindus, Parsis or Christians, an argument accepted and adopted by the people of India for bringing about this salutary and desirable measure of national solidarity and consolidation.

REVIEWS

Handbook on Mercantile Law, Third Edition, by Sri E. Venkatesam B.A., M.L., Advocate, Supreme Court and High Court, Andhra, Guntur, published by the Author, 1955, pages about 604, Price Rs. 11.

This well known book needs no introduction to our readers and its third edition has appeared in right time with a Foreword by The Hon'ble Mr. Justice K. Subba Rao, Chief Justice of the Andhra High Court. It contains in Part I, the law relating to Contracts, Sale of Goods, Partnership, and Negotiable Instruments. The relevant provisions of the respective enactments on these subjects are stated in the appropriate places with brief comments on these topics covered by the case law on the subjects quoting the leading decisions. The same method of discussion is adopted in Part II, wherein separate chapters are devoted to Insolvency, Carriers and Shipping, Insurance, Securities, Arbitration, Societies Registration Act, Trade Unions Act, Workmen's Compensation Act, Factories Act, Industrial Disputes Act and Companies (including Banking Coys.). The author has also given a copious index at the end. The book will be useful to lawyers as a ready reference on so many subjects with easily available references to the leading decisions. In discussing the principles, important English cases including the latest ones on the subject are referred to. We are particularly gratified to note that the Author has not spared any pains to quote the latest authorities on the subjects he deals with; for instance the recent ruling of the Supreme Court in A. I. R. 1954, S. C. 557, holding that the rigid rules of champerty and maintenance as it obtains in the English law do not apply in India, has been duly referred to in dealing with the subject, agreements contrary to public policy and tending to the abuse of legal process, at page 69 of the book. We are sure that this book will be found to be very useful by the students appearing for the B. L. and M. L. examinations and those studying Mercantile Law in other courses. The book is neatly printed on superior white glazed paper and elegantly bound and leaves nothing to be desired. We congratulate the learned author on his success in bringing out this third edition and commened it to our readers.

Text Book of Equity.

By

Sri D. Basu, M.A., B.L., Third Edition, published by S. C. Sarkar and Sons, Ltd., Calcutta, 1955, pages about 380, Price Rs. 8.

The object of this book, as stated by the learned author, is to present the fundamental principles, of equity jurisprudence without going into details, and the learned author traces the origin and development of equity with a short history of the equity jurisdiction and its relation to law, in the first two chapters. The following chapter on Maxims of Equity is very interesting reading and presents to the reader twelve maxims on various topics in law with a brief note on the law on each subject. The remaining chapters relate to the equitable doctrines in the law of Equitable Estates and Interests, Trusts, Election, Mortgages, Contracts, and Equitable Remedies like Specific Performance, Injunction and Receiver. The treatment of the case law and the analysis of the principles are original. The full facts of most of the cases quoted are given in detail and reference is also given to the leading text books on the subject. A book of this kind is sure to be highly useful to a busy practitioner, as also to all students of the development of law and jurisprudence and we recommend it as an useful addition to the library of every lawyer.

SUMMARY OF RECENT CASES.

7—7—1955. C. R. P. Nos. 891 and 892 of 1953.

Ramaswami, J.

Nalambrath Valappil *v.* O. Appukutty.

Madras Buildings (Lease and Rent Control) Act, 1949, S. 8 — "Amenities", meaning of—Inspection by Rent Controller —Notes of Inspection—Necessity.

The word "amenities" cannot be understood to include the roof of a house. The roof forms part and parcel of the building. In this view, a tenant is not entitled to an order under S. 8 on the ground that the house requires re roofing.

The object of enacting S 8 of the Madras (Lease and Rent Control) Act was to check the prevalent tendencies on the part of some landlords who resorted to extra-legal ways in order to make the tenant pay higher rent or make him vacate the premises by cutting off the supply of electricity, water, etc. An interference with these conveniences would interfere with the proper enjoyment of the demised premises and would constitute an infringement under S. 8 of the Act. But even in the case of amenities, it must be shown that the landlord did so without just or sufficient cause.

It is incumbent upon the Rent Controller to take some notes of inspection when he goes for inspection of buildings personally in connection with a pending case.

Mr. *C. K. Viswanatha Ayyar* for Petr.

Mr. *V. P. Gopalan Nambiar* for Respt.

V. C. S. ——

25—7—1955. S. A. No. 1029 of 1951 and A. A. O. No. 95 of 1952.

Krishnaswami Nayudu, J.

A. K. RM. RM. Subbiah Chettiar *v.* P. C. K. Muthiah Chettiar.

Sale of Goods Act, Ss. 14 and 16 and Motor Vehicles Act S. 21 (i)—Sale of a motor car—Transfer of C. certificate and registration—Duty of the purchaser.

Where the purchaser of a motor car knew that his own vendor had not got the C. certificate transferred in his name from the previous owner and with that knowledge purchased the car, paid the price and took delivery and took possession of the C. certificate and the relevant letters, but did not report the transfer and get it registered in his name and later on brought this suit for recovery of the amount against his vendor,

Held : the obligation to report the transfer to the transferring authority is on the purchaser as transferee, and no duty was cast on the transferor to report the transfer. As the purchaser did not take any steps in the right direction it would not be open for him to say that the seller had not done what all had to be done by him. The suit would, therefore, be liable to be dismissed.

Messrs. *D. Ramaswami Ayyangar* and *P. R. Varadarajan* for Appts.

Messrs. *T. Krishna Rao* and *B. Krishna Rao* for Respt.

V. C. S. ——

28—7-1955. Appeal No. 435 of 1951.

Ramaswami Gounder, J.

Lakshmana Ayyar *v.* State of Madras.

C. P. C., O. 22, R. 1—Suit for declaration that dismissal of the plaintiff was wrongful — Prayer for declaration that plaintiff would be entitled to his pay and pension—Death of plaintiff pending suit—Legal representatives, if entitled to continue—Government of India Act, 1935, S. 240—Scope.

Where a suit was filed against the State Government represented by the Collector, for a declaration that the order dismissing the plaintiff from service passed by the Collector was void and inoperative and that the plaintiff was not deprived of his rights to get his pay and pension but still continued in service because, the authority that

removed him from service was different from the authority which appointed him (S. 240 (2) of the Government of India Act, 1935) and pending the suit the plaintiff died and his legal representatives were brought on record, it was contended at the hearing, that the cause of action would not survive to the legal representatives.

Held : as the suit was in substance one for a declaration that the plaintiff was entitled to certain monies, the legal representatives would be entitled to be brought on record, and it cannot be said that the right to sue would be confined to the deceased plaintiff only, as a personal right.

S. 240 (i) of the Government of India Act refers to not only a member of the Civil Service but any one holding any civil post under the Crown. The post of a temporary Additional First Class Magistrate would be a civil post under the Crown, and under Cl. (ii) of that section, he cannot be dismissed from service by any authority subordinate to that by which he was appointed. Therefore, it would be beyond the competence of a District Magistrate in the instant case to direct the dismissal of the deceased plaintiff as Additional First Class Magistrate and the plaintiffs would therefore be entitled to a decree.

Messrs. *N. Sundara Ayyar* and *V. R. Venkatakrishnan* for Appts.

The Govt. Pleader and Mr. *N. S. Srinivasan* for Respts.

V. C. S. ———

2—8—1955 W. P. No. 707 of 1954.

Rajagopalan, J.

Kathiapillai *v.* State of Madras.

Madras Estates Abolition and Conversion into Ryotwari Act (XXVI of 1948) S. 23 (A) (1)—Not discriminatory—Constitutional validity—Constitution of India, Arts. 14 and 31 (A).

The provisions of S. 23 (A) (1) of Act XXVI of 1948 cannot be impugned as discriminatory in nature and as offending Art. 14 of the Constitution in that the working out of the provisions of the section it provides for the levy of a higher rate for wet and dry lands in respect of ryoti lands in an estate which is taken over under the Act. It cannot be contended that the section would be invalid because the rate of assessment in an adjoining ryotwari village is much lower. Even independent of the argument as regards the bar which applies under Art. 31 (A) for challenging the legislation, there is really no basis for the charge of discrimination.

The provisions of Art. 31 (A) of the Constitution will operate as a bar for raising any such contention.

In the case of ryots, all rights which they had before the estate vested in tha Government, were extinguished, and fresh rights and liabilities were created by the Act. If one of these liabilities was to pay assessment at a rate specified by or determined in accordance with the provisions of Act XXVI of 1948, the validity of that provision cannot be challenged on the basis that these rates differed to the detriment of the petitioners from the rates that prevailed in a ryotwari village.

Even if there was an apparent discrimination and apparent denial of equal protection of laws, because the rates imposed under S. 23 (A) (1) of the Act were higher than the rates prevalent in ryotwari villages, that apparent discrimination could be justified on the basis of a reasonable classification.

Messrs. *V. C. Veeraraghavan, R. Desikan, K. S. Desikan* and *K. Raman* for Petrs.

The Advocate General and *the Special Government Pleader* for the State.

V. C. S. ———

4—8—1955. C. R. P. No. 215 of 1952 and A. A. O. No. 187 of 1952.

Rajagopala Ayyangar, J.

Narayani Ammal *v* K. R. Ananthanarayana Ayyar.

Madras Agriculturists Relief Act, Ss 9-A and 19-A — Provisions regarding scaling down—Applicability to proceedings.

The provisions of S. 9-A regarding the scaling down of a debt can be given effect to in a proceeding under S. 19-A of the Madras Agriculturists Relief Act as in a suit for redemption.

1955 (2) M.L.J 30: Followed.

Messrs. *C.K. Viswanatha Ayyar* and *M.R. Krishnan* for Petr.

Mr. *C. S. Swaminathan* for Respt.

V. C. S. ——

5—8—1955 C. R. P. 1281 of 1953.

Panchapakesa Ayyar, J.

K. Karunakaran Nair *v.* Methalayil Chathu.

C. P. C., O. 21, Rr. 66 and 90 and S. 47—Sale without notice to judgment debtor—Effect.

Where in a case notice under O. 21, R. 22 C.P.C. is not required, as the execution petition was filed within 2 years of the decree and the notice under O. 21 R. 66 will be the very first notice which will go to the judgment-debtor, and such notice is not issued and the proclamation is drawn up and the sale is held without the judgment-debtor being even aware of the proclamation or the sale, then the sale so held will be a nullity and it will not be a case of mere irregularity and any knowledge about the sale or sale proclamation after the sale is over will not alter the matter. But where the judgment debtor was fully aware of the sale proclamation and has not suffered the least damage or injury by the omission to issue a notice under O. 21, R. 66, that will amount only to irregularity and not to an illegality.

If the sale were a nullity the proper section applicable will be only S. 47, C.P.C.

Though most of the cases of sale, without notice under O. 21, R. 66 C. P. C., would fall only under O. 21, R. 99, C.P.C. some rare cases may fall only under S. 47 C.P.C. the distinction depending on the facts in each case showing knowledge of the sale.

Mr. *V. P.Gopalan Nambiar* for Petr.

Messrs. *K. Kuttikrishna Menon* and *V. Balakrishna Eradi* for Respt.

V. C. S. ——

8—8—1955 C.R.P. No. 475 of 1953.

Rajagopala Ayyangar, J.

Parvathi Ammal *v.* Subramania Pillai.

Court Fees Act, S. 7 (iv) (a) and 7 (iv) (c). —Suit for declaration of title and of possession and injunction—Allegation that defendant's claim to have been adopted by plaintiff was not true—Setting aside the adoption deed, if necessary.

Where in a suit for a declaration that the plaint properties belong to the plaintiff and are in her possession and for a permanent injunction restraining the defendant from interfering with the plaintiff's enjoyment thereof, the plaintiff alleged that the defendant's claim to those properties on the footing of having been adopted by the plaintiff was false, it was contended that the plaintiff was bound to have prayed for a declaration that the adoption referred to in the plaint was invalid and paid court-fee thereon ;

Held : An adoption deed is not *per se* a document securing money or other property having monetary value within the meaning of S. 7 (iv) (a) of the Court Fees Act. When the factum or the validity of an adoption is challenged, it is not necessary to set aside the deed, which merely recites the adoption and is only evidentiary of it. If on a construction of the adoption deed the conclusion is reached that it goes beyond the mere recital of an adoption and the consequential right to property flowing from a valid adoption, that is, if the document constitutes a disposition of property, then it would certainly have to be set aside before a party to such a deed can have relief on the footing that the document is not binding upon him or her. In other cases, where the document is merely evidence of the fact of the adoption, there is no necessity to set aside the document, because the right to the property flows not from the document but from the adoption of which it is merely written evidence.

Messrs. *S. Ramachandra Ayyar* and *G. M. Alagarswami* for Petr.

The Asst. Govt. Pleader and Mr. *T. M. Chinnayya Pillai* for Respt.

V. C. S. ——

10—8—1955 W. P. No. 216 of 1955.

Rajagopalan, J.

S. Ibrahim Sahib *v.* K. Nagarathnammal.

Madras Hereditary Village Offices Act (III of 1895), S. 10 (5)—Appointment of a deputy for a minor who is the registered holder of an office—Considerations.

Where in an appeal against an order appointing a deputy for a minor who was registered as the holder of a village office under Act III of 1895, the Collector held that the person appointed as deputy could not be expected to look after the interests of the minor as it was undesirable to appoint a Muslim as a deputy to a Hindu, it was contended in an application to quash that order that the discrimination envisaged by the Collector contravened the Articles of the Constitution ;

Held : rejecting the contention the considerations of the Collector cannot be said to be irrelevant, and it could not also be held that the Collector set aside the appointment of the deputy only on the ground that he was a Muslim.

Mr. *N. Arunachalam* for the Petr.

Mr. *M. M. Ismail* and *The Special Govt. Pleader* for the Respt.

V. C. S. ——

11—8—1955. C. R. P. No. 1590 of 1952.

Basheer Ahmed Soyeed, J.

Pakkath Manakkal Karnavan *v.* Anthooreyil Achuthan Nair.

C. P. C., O. 9, R. 11 and O. 5, Rr. 17 to 19 —Notice to be defendant of the hearing of the suit—Absence of evidence—Effect—O. 41, R. 23—Scope —Appellate Court's powers after setting aside *ex parte* decree against a particular defendant.

The provisions of O. 5, Rr. 17 to 19 regarding the service of notice on a defendant are mandatory in nature and if there is any irregularity in compliance of the same an *ex parte* decree may have to be set aside; but if the Court is satisfied that the defendant had notice of the hearing of the suit sufficiently in advance of the date of such hearing the *ex parte* decree need not be set aside. Where there is no satisfactory evidence that the defendant had notice otherwise of the hearing of the suit, the mandatory provisions will operate.

Under the provisions of O. 41, R. 23, C. P. C., the appellate Court has ample jurisdiction to set aside an *ex parte* decree so far as the appealing defendant is concerned and direct the lower Court after setting aside the *ex parte* decree to re-try the suit and dispose it of afresh, so far as the particular defendant aggrieved is concerned

Such a procedure cannot be said to be incorrect as not warranted by the provisions of the Code.

Messrs. *D. H. Nambudripad* and *K. P. Madhava Pisharodi* for Petr.

Mr. *M. C. Sridharan* for Respt.

V. C. S. ———

22—8—1955. S. A. No. 1014 of 1951.

Krishnaswami Nayudu, J.

Kuppammal *v.* Pattanna Chetty.

C. P. C., O. 13, R. 4 and Stamp Act, S. 36 —"Admitted in evidence"— Meaning of.

The mere fact that an endorsement on a document as required under O. 13, R. 4, Civil Procedure Code, has been made, should not in every case be considered as sufficient to hold that the document has been admitted. In cases where no objection has been raised to the admissibility of a document on the ground of insufficiency of stamps and an endorsement of admission under O. 13, R. 4 is made and objection to such admissibility is not taken at any stage of the trial of a suit, it will not be open to any party to raise the objection in appeal before any other forum to which the matter might be taken up. But to hold that by the mere mechanical act of stamping the endorsement under O. 13, R. 4, the Court has applied its mind as to the admissibility of the document, when the first issue (as in the present case, whether the suit was maintainable as the pronote did not bear the revenue stamps, was pending decision), would be to deny the Court the right to reject the document if it is found that it has been insufficiently stamped and therefore inadmissible in evidence. If the Court had not applied its mind but allowed it to be endorsed under O. 13, R. 4, that would not, however, deprive the Court of the right of rejection or it if, on the consideration of any objection raised as to its admissibility, the Court comes to the conclusion that the document is inadmissible.

Case-law : Considered.

Mr. *A. V. Narayanaswami Ayyar* for Appt.

V. C. S. ———

24—8—1955. Appeal No. 734 of 1950.

Rajamannar, C. J., and Panchapakesa Ayyar, J.

Ramaswami Thevar *v.* Kasim Muhammad Marakayar.

Hindu Law—Widow's Estate—Scope.

A Hindu widow, who inherits an estate, undoubtedly takes only a limited interest therein. She is at liberty to sell or otherwise dispose of her limited interest. She has also the power, though a very restricted and qualified power under the law, to convey a larger interest than she has and pass an absolute title to her alienee, provided the transaction is substantially justified by legal necessity or benefit. Those who deal with a female limited owner, but claim to have acquired more than her limited interest, must prove facts and circumstances justifying the alienation of a larger interest by her. The burden of proof is on the alienees from the limited owner to establish either (a) that the alienation was justified by legal necessity or was for the benefit of the estate, or (b) that they had made reasonable and *bona fide* enquiries as to the existence of the necessity or benefit and satisfied themselves about the same before taking a sale or mortgage from the the limited owner binding on the entire estate. The onus is not on the reversioner to prove that the estate left by the last male owner was sufficient to meet the claims against it and the needs of the limited owner and that the alienation was unnecessary. Lapse of time does not shift the burden of proof from the purchaser to the reversioner who impugns a sale by the limited owner, and it is incorrect to say that the necessity should be presumed from mere lapse of time.

Normally a Hindu widow is bound to pay the interest on the debts from the income of the property enjoyed by her as limited owner, provided that income has got a surplus over her legitimate needs for maintenance and the preservation of the estate, both physically and against hostile litigation; a sale of a portion of the property in such cases to pay the interest on the debts accruing during her period will not be covered by legal necessity; though, where the amount covered by such interest in the consideration for a sale deed is small, the sale deed may be upheld in full. But a widow is not bound to apply the surplus income to the payment of the principal amount of the debts, and can enjoy the entire surplus herself and can alienate properties for paying off the principal amount of the debts. The proportion between the portion of the consideration covered by necessity and the portion not covered by necessity has to be considered by a Court when it decides whether to set aside the alienation or confirm it subject to terms. Each case has to be decided on its own merits.

Messrs. *R. Kesava Ayyangar* and *K. Parasaran* for Appts.

Messrs. *T. R. Srinivasan, S. Gopalaratnam, A. K. Annaswami Ayyar* and *R. Desikan* for Respts.

V. C. S. ——

SUMMARY OF RECENT CASES.

5—5—1955 Appeal No. 262 of 1950.

Rajamannar, C.J., Rajagopalan and Rajagopala Ayyangar, JJ.

Palaniswami Goundar *v.* Devanai Ammal.

Hindu Married Women's Rights to Separate Residence and Maintenance Act (XIX of 1946) S. 2 (4)—"Marries again"—Meaning of—Second marriage prior to the commencement of the Act—Inapplicability of the Act—No right to separate maintenance merely on that ground.

S. 2 (4) of Act XIX of 1946 which provides that a Hindu married woman shall be entitled to separate maintenance and residence from her husband "if he marries again," does not apply to the case of a second marriage prior to the commencement of the Act. The first wife of a Hindu who has taken a second wife in marriage before the commencement of the Act cannot, therefore, have a right of separate residence and maintenance merely on the ground that her husband has married again.

(1950) I M.L.J. 63 and (1955) I M.L.J. 25 : Overruled.

(1953) I M.L.J. 649: Approved.

(1955) Nag. 33 and (1953) Bom. 342 : Followed.

Messrs. *T. P. Gopalakrishnan* and *L. K. Sarma* for Appt.

Mr. *S. Thyagaraja Ayyar* for Respt.

V. C. S.

21—7—1955 C. C. A. No. 94 of 1952.

Basheer Ahmed Sayeed, J.

Raj & Co. *v.* T. P. Narasimhan.

Contract Act, S. 30—Wager—Stock Exchange transactions—Nature of—Position of a Stock Broker—Rights as between contracting parties—Rules of Stock Exchange, how far applicable—Principal and agent.

In a suit brought by a firm of brokers in Stocks and Shares against a similar broker, for recovery of amounts due to the plaintiffs in respect of certain dealings, it was contended for the defendant that the plaintiffs had dealt with the defendant in their capacity as agents and therefore they could claim only an indemnity for the actual losses that had been incurred by them in respect of the contracts for sale and purchase and that the dealings were wagering in character,

Held, on the facts, that since there had been no intention and no obligation to take or deliver the stocks and shares, as could be gathered from the circumstances in which the two parties had been placed, the natural and legal inference would be only that those contracts were of a wagering nature, in which one party had necessarily to win and the other to lose, depending upon the rise or fall in the market price of the stocks and shares sold or purchased. So long as the agreement appears to be only to pay according to the ruling prices on the settlement dates, the contracts cannot but be wagering contracts.

The position of a Stock Broker is very peculiar. He acts both for the buyer and the seller and his position cannot be approximated to the position of an ordinary agent. Though as a mere broker he may be entitled to an indemnity, still as the plaintiffs had acted with the defendant as principals to principals no question of indemnity for actual loss would arise. It is not therefore necessary that the plaintiffs should have incurred the actual liability. It would be enough if they prove that they had incurred the liability by reason of the transactions entered into by them with the defendant. (1948) 1 M. L. J. 178 and 1953 Mad. 296 : Referred to.

The analogy of Forward Contracts which partake of the nature of wagering, is not appropriate in the case of transactions in Stock Exchange. 1941 Cal. 341 : Ref. to.

The rules of a Stock Exchange could be taken to be comprehensive and binding on all persons who deal in Stock Exchange transactions, either they be members of the Stock Exchange Association or outside it. Rules govern the transactions as such and not the members. So, even if they are outsiders, the transactions would be governed by those rules.

It is not always impossible to arrange for delivery of the shares when the volume of business is big. Those who deal in Share Market know that it is possible to bring about delivery of shares even of large business.

Though the boundary line between speculative transactions and wagering ones is thin, the distinction has always to be kept depending on the intention of the parties to perform the contract or not.

Mr. *K. M. Venkatavaradachari* for Appt.

Messrs. *R. Gopalaswami Ayyangar, C. R. Rajagopaladhari* and *B. T. Sampath* for Respt.

V. C S.

28—7—1955. Appeal No. 513 of 1950

Govinda Menon and Ramaswami, JJ.

K. S. Narayana Iyer *v.* Ponna Moothan

Hindu Law—Widow—Surrender—Principles—Assent of next reversioner—Effect—How far binding on the actual reversioner when the succession actually opens—Nature of a widow's alienation.

The principle of Hindu law underlying the surrender made by a widow or a daughter having only a life estate in favour of the nearest reversioner has been well established by a long course of judicial decisions. What has to be seen in each case is, whether by the particular deed, there is such an effacement of all the interest of the limited owner as to vest the

estate in the next reversioner. A surrender need not be in any particular form and the fiction of surrender is implied when the widow parts with all her rights.

The decision of the Supreme Court in A. I. R. 1952, S. C. 109 *Mumma Reddy* v. *Durai Raja*, does not seem to have entirely approved of the decision in *Nobokishore* v. *Harinatha*, 10 Cal. 1102 which extends the principle of a valid surrender to a conveyance made by a widow upon ostensible ground of legal necessity and such transfer or conveyance being assented to by the person who at the time is the next reversioner and laying down that it will be therefore binding on the actual reversioner coming into existence on the death of the widow, so that such person could not dispute the alienee's title. But the Supreme Court decision seems to have approved of the decision in 58 Bom. 521 and 60 Bom. 211 which have not in any way been overruled.

An alienation by a widow cannot be considered to be void from the very beginning but the reversioner can always attack the alienation on the ground that it is not for necessity or a binding purpose of the estate.

Messrs. *C. S. Swaminathan, D. A. Krishna Variar, Ravi Varma, K. Kuttikrishna Menon* and *V. Balakrishna Eradi* for Appt.

Messrs. *K. Rajah Ayyar, R. Somasundaram, K. P. Ramakrishna Ayyar. P. R. Ramachandhra Ayyar, M. K. Nambiar, P. S. Menon, T. C. Raghavan* and *V. B. M. Menon* for Respts.

V. C. S. ——

29—7—1955. C. R. P. No. 856 of 1953.

Ramaswami, J.

Virjee Daya and Co., *v.* Ramakrishna Rice and Oil Mills.

Contract Act, S. 30—Forward Contracts —Nature of—Tests for determination—The Vegetable Oils and Oilcakes (Forward Contract Prohibition) Order, 1944, Cl. 3—Scope.

A forward contract is an executory contract consisting of two reciprocal promises between two parties, viz., the buyer and the seller. In substance, it is an agreement to sell or buy by one person to another to be performed on a subsequent date fixed by the parties. Delivery and payment are concurrent conditions. Forward contracts get hit by S. 30 of the Contract Act only when the primary purpose of the contract with which it was intentionally entered into by both parties was with a view to breach in order to profit by the rise or fall in the market value as distinct from regular trading or investment. In other words, forward contracts become illegal wagering contracts when the parties by common consent agree to speculate only in differences according to the rise and fall in the prices in the market and the delivery of the goods is not in the contemplation of either and the transaction is merely a bet on prices and a gamble in differences.

Tests laid down for finding out whether transactions made to wear the appearance of valid contracts are really wagering contracts.

Where in respect of a transaction for the sale of groundnut oil, it had all the indicia of a transaction not hit by the Vegetable Oils and Oilcakes (Forward Contract Prohibition) Order, viz., the purchasers were a well known firm dealing in the sale of oil, the seller was an equally well known firm of preparers and sellers in bulk of oil the dates on which the order was placed and the drums supplied and the provision for delivery all showed that this was not one of those cases of wagering contracts with *Voidas* where the object would be merely to enforce the breach and settle the differences, such a transaction would be a legal one.

Messrs. *Mehta and Tarwadi* for Petrs.

Mr. *M. K. Harihara Ayyar* for Respt.

V. C. S. ——

5—8—1955 C. R. P. 473 of 1953.

Rajagopala Ayyangar, J.

B. N. Surendra *v.* G. A. Ajiwani.

Madras Buildings (Lease and Rent Control) Act, 1949, S. 7 (3) (a)—Exemption to persons 'engaged' in Government service—Meaning of—Person under suspension—If entitled to exemption.

The notification under S. 7 (3) (a) (i) of the Madras Buildings (Lease and Rent Control) Act providing that employees of the State and the Union Governments shall be deemed to be engaged in essential service for the prupose of the said Sub S. (i) will be applicable as long as a Government servant continues to be a Government servant, i.e., till his dismissal, he is "engaged" for the purpose of S. 7 (3) and is entitled to claim the exemption created by the section. It cannot be contended that a Government servant under suspension is not "engaged" in Government service.

Mr. *D. B. Jagannadha Rao* for Petr.

Mr. *A. Subrahmanya Ayyar* for Respt.

V. C. S. ——

5—8—1955. W. P. Nos. 397 and 428 of 1955.

Krishnaswami Nayudu, J.

A. L. A. R. Somanathan Chettiar *v.* The Commissioner, Hindu Religious and Charitable Endowments.

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), S. 31 (1) Scope—Constitution of India, Art. 19 (1) (f) —'Property'— Inclusion of heriditary trusteeship—Interference by the Commissioner —How far permissible — Excess of jurisdiction—Liability to be quashed under Art. 226.

Where in respect of a religious institution, the Commissioner for the Hindu Religious and Charitable Endowments passed an order constituting a Board of Trustees and another order under S. 103 (e) (ii) of Act XIX of 1951 declaring that all the powers conferred and all duties imposed by the scheme framed in respect of that institution by the Court previously shall be deemed to have been conferred on the Commissioner and

that the Devasthanam Committee appointed under the scheme would be deemed to cease to exist, a member of the Devasthanam Committee filed this petition under Art. 226 of the Constitution claiming to be a hereditary member of the Committee and stating that the said orders which sought to interfere with his hereditary rights were illegal and *ultra vires*,

Held: the Commissioner for the Hindu Religious and Charitable Endowments has power under S. 39 (i) of Act XIX of 1951 to constitute a Board of Trustees, only where a religious institution had no hereditary trustee.

In so far as religious institutions in Southern India are concerned, these who are entrusted with the managment and the administration of the temples and their properties are originally called Dharmakartas and the position of Dharmakartas is that of a trustee; and the Dharmakartas of a temple have therefore been called as trustees. If a person who has got a hereditary right of management is not called a trustee but is only called a manager, that hereditary right of management does not cease to become 'property' simply for the reason that he is not termed as 'trustee'. There is therefore; no peculiar significance in the use of the word 'trustee'. It only implies the casting on the person who is in management and who is called trustee, certain obligations which a trustee under English law has to discharge. 'Trustee' is defined in the Act under S. 6 (19) as meaning any person or body by whatever designation known in whom or in which the administration of religious institution is vested and includes any person or body who or which is liable as if such person or body were a trustee.

The right of management of the affairs of the temple is primarily vested in the Committee of management under the Scheme framed for the temple and the trustee under the scheme is one who is appointed by that Committee of management and is in the position of an executive officer entrusted with the day to day administration of the temple and paid a salary from and out of the funds of the institution. The members of the Committee of management are persons who work without remuneration and are the Dharmakartas of the temple entrusted with the administration of the temple and its affairs, which administration is carried on by means of the appointment of a paid officer. The Committee of management really constitute the Board of Trustees and the trustee under the scheme is by virtue of the provisions a paid officer or a salaried servant. He cannot be considered to be a 'trustee' even within the meaning of the definition of a trustee under the Act. It therefore follows that by whatever nomenclature the petitioner may be called under the scheme, he is virtually the hereditary manager or trustee.

The provision in the scheme that the male descendant in the male line of the Founder of the Institution should be a person possessing certain qualifications could not be considered to be a circumstance rendering succession to the office not being by hereditary right.

Since the hereditary right of management of the temple is vested in the petitioner and since such a right is 'property' within the meaning of Art. 19 (i)(f) of the Constitution, the order of the Commissioner superseding the Committee of which the petitioner was a member offends the constitutional safeguard provided under Art. 19 (i) (f) of the Constitution and not having been shown to come within any of the exceptions to that Article, the order would be illegal and liable to be quashed.

Mr. *O. Radhakrishnan* for Petrs.

The Spl. Govt. Pleader and Messrs. *K. S. Sankara Ayyar, R. Kesava Ayyangar* and *K. Parasaran* for Respts.

V. C. S. ——

9—8—1955 W. P. No. 425 of 1955.

Rajagopalan, J.

Sastri Ammal *v.* Pravalavarna Naicker.

Madras Hindu Religious and Charirable Endowments Act (XIX of 1951) S. 57 (b) Scope—Applicability only if the dispute was regarding hereditary job of the trustee — Inapplicability regarding constesting claims of two persons.

The terms of S. 57 (b) of Act XIX of 1951 provide that if the dispute is, whether the office of trustee of a given religious institution is hereditary, it would certainly come within the scope of S. 57 (b). That is all that S. 57 (b) provides for. A dispute between the claimants to succeed to an office, which it is admitted on all hands is hereditary, is not within the scope of S. 57 (b) of the Act. The only dispute that falls within the scope of that section is the dispute whether a trustee holds or held office as hereditary trustee? That does not include within its ambit a dispute respecting a right to succession to a hereditary office.

If a dispute arises whether the office of trustee in the institution is hereditary or not, for on that would depend the answer to the question whether there are no hereditary trustees within the meaning of S. 39, such a dispute is specifically brought within the jurisdiction of the Deputy Commissioner under S. 57 (b) of the Act. If there is no dispute that the office is hereditary,, but the dispute is who should succeed to that hereditary office, S. 47 (3) provides for interim arrangements being made by the Deputy Commissioner till the dispute over succession is decided.

If an order of the Deputy Commissioner is liable to be set aside as one passed by a Tribunal wholly devoid of jurisdiction, the order of the Commissioner, which confirmed that order, would also have no basis by itself and it cannot be contended that the High Court cannot issue a writ in such cases.

The existence of an alternative remedy is not a statutory bar to the exercise of jurisdiction under Art. 226 of the Constitution, though it is well settled that the Court would be slow to exercise its discretion in favour of the issue of a writ, if there is an alternative remedy open to the petitioners.

It is true that when a party voluntarily submitted to the jurisdiction of a Tribunal which had no jurisdiction, he would not be heard in proceedings under Art. 226 of the Constitution to say that the Tribunal had no jurisdiction, merely because the decision of the Tribunal went against him. But it is not his submission to juridiction that confers jurisdiction on the Tribunal. It is merely a case of a factor being taken into account before the Court decides whether it should exercise its discretion in favour of the applicant before it. In this case, however, it could not be said there was real submission to the jurisdiction of the Deputy Commissioner to adjudge the dispute and therefore, the fact that the petitioner had appealed to the Commissioner to set aside the order of the Deputy Commissioner, would not dis-entitle him for the grant of relief under Art. 226 based on the finding, that the Deputy Commissioner had acted wholly without jurisdiction.

Messrs. *C. Santhamurthi Naidu* and *A. Venkatachari* for Petr.

The Spl. Govt. Pleader and Mr. *S. Ramanujachariar* for Eespt.

V. C. S. ——

10—8—1955. Appeal No. 545 of 1951.

Govinda Menon and Ramaswami Gounder, JJ.

Gowri Shedthi *v.* Sankanna Shedthi.

Aliyasanthana Act (IX of 1949), S. 36 (6) and S. 3 (b) (i) and (ii) — Definition of the word 'kavaru',—Scope of S. 36—Partition —Division—Pre-requisite.

In a suit for a declaration that a Kararnama, entered into between the members of a Kudumba was an out and out partition as contemplated under S. 36 (6) of the Aliyasanthana Act or in the alternative to divide the properties and allot the share to the plaintiffs, it was contended that the Karar was only an arrangement for purposes of enjoyment and did not disrupt the family as such or put an end to the community of property between the parties, and that, in any event, since, on that date there were other properties belonging to the kudumba not included therein, the essential pre-requisite for the application of S. 36 (6) had not come into existence, and that, therefore, the suit would have to be dismissed.

Held : the necessary pre-requisites for the application of S 36 (6) are ;—(1) there must be a registered family settlement or award; (2) all the major members of the kudumba must be parties to that ; (3) the whole of the kudumba properties must have been or intended or purported to have been distributed ; and (4) the distribution must be among all the kavarus of the kudumba for their separate and absolute enjoyment in perpetuity.

The section contemplates that the whole kudumba properties must have been distributed or were intended to be distributed or purported to have been distributed. It is, therefore, not absolutely necessary that as a fact all the properties ought to be distributed. If the parties thought and thereby evidenced an intention to distribute what they considered to be the properties at that time among all the kavarus, then that condition has been satisfied.

Section 36 (6) only says that there should be a distribution among all the kavarus. It is not said that the distribution should be among the kavarus separately or individually. We have to read the section as not intending such distributive distribution. It is possible that two or three kavarus may combine together and the properties jointly distributed to them. If a family has three or four kavarus, S. 36 (6) does not contemplate a necessary distribution among as many kavarus as exist. There is nothing preventing the distribution among two or three kavarus as a composite whole. That would still satisfy the provisions of S. 36 (6).

Mr. *T. Krishna Rao* for Appts.

Mr. *S. Ramayya Nayak* for Respts.

V. C. S. ——

11—8—1955 A. A. O. No. 228 of 1953.

Ramaswami, J.

Kasinathta *v.* Vittal Rao.

C. P. C., O. 1, R. 8—Cause of Action—Promissory note executed in respect of amount due on dealings—Suit on the original cause of action—Maintainability.

Where in respect of certain dealings between the parties, the defendant executed a pronote for a certain sum in favour of the plaintiff towards the amount due as per the transactions which was not the same amount due in respect of the dealings but a little less than that, and the plaintiff brought this suit against the defendant, it was resisted on the ground that the plaintiff could not sue on the original cause of action as the claim had become merged in the promissory note,

Held, by the mere passing of a promissory note, the plaintiff could not be compelled to sue only the pro-note and the effect of the instrument was nothing more than a conditional satisfaction payment with recourse to the original debt.

Case-law considered.

Mr. *E. A. Viswanatham* for Appt.

Mr. *P. M. Srinivasa Ayyangar* for Respt.

V. C. S. ——

20—9—1955. C. M. A. No. 406 of 1954.

Ramaswami, J.

Arunachalam Chettiar *v.* Meyyammai Achi.

Civil Procedure Code, (V of 1908), S. 48 (2)—Execution—Wilful evasion of arrest—If constitutes fraud of judgment-debtor—Limitation.

Wilful evasion of arrest in execution of a decree is fraudulent prevention of execution within the meaning of S. 48 (2) of the Civil Procedure Code.

Care-law reviewed.

A. I. R. 1946 Mad. 172, A. I. R. 1922 Mad. 3 ; 12 L. W. 710=1920 M. W. N. 788 ; 6 Mad. 365 : 35 Mad. 670 : 24 M. L. J. 270 ; 34 All. 120 : 47 M. L. J. 428=20 L. W. 475 ; A. I. R. 1924 Mad. 836 : Followed.

Mr. *K. Parasaran* for Appt.

Mr. *T. S. Vaidyanatha Iyer* for Respt.

V. C. S.

WHITHER SUPREME COURT

Without meaning any disrespect to the learned and Honourable Judges of the Supreme Court of our country, we are constrained to observe that we are greatly perturbed by some of the recent pronouncements of that august Tribunal. It has not been a rare experience to find Judges of the Supreme Court reaching the same conclusion by different reasoning, sometimes even inconsistent. But the litigant hardly cares for the subtleties or the erudition in the several judgments, because he is concerned only with the result which alone he cares to or can understand. The rest is all for the edification of the lawyer for future arguments on the same or similar points. It is no doubt a matter for anxious consideration whether the practice of pronouncing divergent judgments for the same conclusion would contribute to the healthy growth of the law. Despite examples of the House of Lords and the American Supreme Court one cannot be blamed for feeling that the practice of the Privy Council of delivering only one judgment in each case is better than the practice of the House of Lords if only for the reason that in the pronouncements of the Privy Council one finds a consistency of thought and coherence of reasoning which are lacking in the divergent pronouncements of the other Tribunals. It appears also permissible to postulate that it was not the contemplation of the framers of the Constitution that there should be more than one judgment in a case except when one of the Judges dissents. But for one reason or another the Judges of the Supreme Court do not appear to be very anxious to put any restraint upon themselves either in the matter of delivering separate judgments or in the matter of making those judgments unnecessarily lengthy.

Be that as it may, the latest decision of the Supreme Court in connection with Tax on Inter-State sales raises a question of outstanding importance, and if one may say so, of embarrassment as well. Is the pronouncement of the Supreme Court that it is not bound by its previous decision on the same point proper ? There can be little doubt that the decision that there can be no sales tax on Inter-State sales has been hailed with universal relief. The decision of the Supreme Court in the *United Motors* case satisfied neither the legal sense nor the moral sense nor common sense. The wonder was that eminent Judges had rendered that decision at all. Anyhow that has now gone overboard and since the confusion and the difficulties experienced in the enforcement of Sales Tax on Inter-State sales will no longer be there, one need not shed tears on this decision ceasing to be operative. Coming to the power of the Supreme Court to overthrow its previous decision, there is an elaborate consideration of the *pros* and *cons* and the necessity for such an action in exceptional circumstances. But it raises a larger question regarding the desirability or otherwise of ignoring judicial precedents of the highest Tribunal of the land. If a particular decision of the Supreme Court is unsound and requires to be set at naught, one would have preferred the legislature to intervene and do the right thing instead of the Supreme Court itself going back on its previous ruling, however compelling the circumstances may be. As it is, the present view that the Supreme Court is not bound by its former judgments will encourage the notion that no decision of the Supreme Court is final on the point decided, and even though a point has been already decided one way by the Supreme Court, the same point can again be raised before it with a view to get a contrary decision. To give room for such an impression is particularly unfortunate at this stage of our political progress and adds to the uncertainties of the Law and its development which one regrets to see in the recent activities of our country's legislatures.

THE LAW COMMISSION.

The appointment of a Law Commission for the revision of the laws of our land has been universally welcomed as a desirable and necessary step for placing on the Statute Book enactments which can stand the test of time, reason and justice. It has been the experience of the judiciary, the Bar and the legal public that they are often at a loss to understand the justification for the continued existence of some of the old statutes or the incomprehensible provisions in some of the later ones. That a thorough overhaul is absolutely necessary for the building up of a sane and sensible jurisprudence for our country cannot be gainsaid. But in this task the best brains, the maturest experience and the highest scholarship must combine for contribution to its success. The Government must make a sedulous search for the legal talents wherever they may be, either amongst the Judges or amongst the members of the Bar or professors of colleges, politicians or others, without confining itself to mere credentials furnished by the Income-Tax Returns. It is common knowledge that a lawyer may show a bumper income without knowing much of law and a real jurist may pine in obscurity and indigence. This is the opportunity for the Government to harness the knowledge and erudition of persons who really know the law wherever they may be found and to canalise their learning in the direction of a building up of a sound reservoir of statute law for our country.

While here, we are gratified to find that our friend Mr. K. Srinivasan I.C.S. than whom it is difficult to find a more deserving and desirable person for the post of Secretary for the Law Commission, has been chosen to fill that post. He is well known in our parts for his efficiency and expedition in the disposal of cases before him, both when he was a District Judge and when he was the Chairman of the Madras Sales Tax Appellate Tribunal. The atmosphere in his Court has always been pleasant and it has always a pleasure for the lawyers to appear before him. We wish him all success and glory in his new sphere of activity and hope that ere long he will come back to us to be the recipient of higher honours in store for him.

It is also a matter for consideration that every State now stands in need of a revision of its own laws. Though one would prefer a uniform system of statutes obtaining throughout the Indian Union, one cannot shut one's eyes to the needs for local variations in some of the aspects of law which make for separate consideration in any particular State. As it is, each State has also its own separate laws not altogether distinguished by clarity of expression or equity of policy. These have to be jettisoned, and in their stead, more reasonable and robust laws have to be substituted after a comprehensive review of those now existing. This would require the constitution for each State of a separate Law Commission, consisting of the best legal talents available in the region. The task of such commission will be not only to hammer out the laws of the particular State for the overhauling of which it is constituted but also to supplement with knowledge and suggestions the labours of the Central Commission. It is needless to emphasise that in this work of reconstruction of Statutes, whether it be in the State's sphere or in the Central sphere, the services of legal experts on each subject, be they lawyers, jurists or professors, must be requisitioned so that a body of sane and sensible laws may be reconstructed, which would evoke the admiration and the envy of the other Nations of the world. There is, however, one note of caution that we venture to sound at this stage. Let each law that may be made be permeated by the spirit of justice and the genius of our country. Emulation of the examples of other countries need not be ruled out and may even be welcome in particular matters, but let not that descend to mere indiscriminate copying without an independent scrutiny of the suitability of the model to the democratic set-up of our country as a welfare State.

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THE LAWYER

We welcome the resolution of the Madras State Bar Federation to start a journal under its auspices. With the issue of the first part of THE LAWYER, which is to be published on the Vijaya Dasami day this year, (26th October, 1955), what has been the ambition of the founders of the Federation will become a realisation. If credit for this achievement should go to one person more than to any other, it must go to Mr. K. Rajah Ayyar, the President of the Federation. No doubt, the co-operation and encouragement of the members of the Editorial Committee have greatly contributed to the achievement, but it is certainly true to say that but for the single-hearted devotion and drive of the President this Journal would not have been.

The immediate occasion for the starting of the Journal was the necessity felt amongst the members of the Bar for having an organ for ventilating their views without fear or favour in the interests of an efficient administration of justice. Strangely, of late, the legal profession has come in for a lot of undeserved criticism at the hands of persons who ought to know better. It is surprising that despite the sacrifices that the leaders of the Bar have made in winning Independence for the country and the services rendered by them in hammering out a Constitution suited to the genius of the Nation, some of our public men still indulge in making hostile observations against them. In the circumstances it has become imperatively necessary that the members of the legal profession should organise a Journal of their own for exposing the hollowness and the injustice of such animadversions.

There has of late been an overwhelming flood of legislation with little or no law, logic or language. Those engaged in the administration of justice have more often than not been baffled in their endeavour to find out if the legislature has any mind at all, let alone a sane mind. It is felt that though it is within the zone of a politician's functions to postulate the fundamental policies of governmental action, the principles and procedure to be laid down legislatively in clear and correct phraseology for implementing those policies, fall naturally within the sphere of the lawyer's equipment. This has been lost sight of in recent times, with the result that we are often led to doubt whether we are marching forward or backward. One of the special aims and endeavours of this Journal, it is understood, will be in the direction of helping the legislatures in their task of statute-making on correct and consistent principles.

The sponsors of the Journal are not unalive to the fact that a mere cold legal Journal is not going to be always welcome either to the lawyers or non-lawyers. Though there is not likely to be any departure from the known standards of legal journalism, this Journal, it is stated, will also contain information and extracts pertaining to Law and Lawyers which will be both interesting and instructive. Cuttings from foreign journals, reminiscences of the Bar and the judiciary, tit-bits and anecdotes of courts and lawyers will also find a place in the columns of the Journal. The dignified roll which THE LAWYER must play will be zealously guarded and preserved and the educative aspect of journalism will be sedulously emphasised, but smiles and cheer will also run through its teaching of law, so that the reader when he lays down an issue of the Journal may feel that he has had quite a pleasant and profitable reading.

It would be apparent that this Journal is not the usual stereotyped report of the decisions rendered. It is a Journal in the real sense of the term, meaning a critical survey of the legal domain of the past, the present and the future and a suggester of improvements wherever there is need for the same. The experiment is rather unique in this country, but is launched upon on the models of similar periodicals in England and America. The Law Quarterly, the Solicitors' Journal, the Law Journal and the Law Times Journal of England and similar type of legal journals in America have demonstrated that for a healthy growth of law in any country, mere report of decisions

alone will not do, and that better service is rendered by articles and criticisms by well known Lawyers and Jurists emanating from their study, knowledge, and experience. It is also to achieve similar results in our own country that the starting of this Journal has been decided upon in collaboration with and on the encouragement of leading members of the Bar. It is hoped that in the understanding of the complicated enactments with which the present Statute Book of India bristles, the members of the Bar engaged in specialising in various branches of law, civil, criminal, procedural, substantive, etc, will come forward to help and point out the defects in the existing legislation and suggest alterations and improvements therein.

The Journal is started under very happy auspices on Vijiaya Dasami day with the blessings and good wishes of all those interested in the dissemination of healthy and useful legal knowledge. It is a matter of particular satisfaction and pleasure to us that the Associate Editors of our Journal have also been chosen to officiate as Associate Editors of the Lawyer. It is hoped that the patronage and co-operation of the members of the Bar, the judiciary, the legislature and the public will enable the "LAWYER" to reach the goal of success and prosperity in the years to come, sooner than later.

SUMMARY OF RECENT CASES.

16—8—1955. W. P. No. 443 of 1955.

Rajagopalan, J.

Veeraswami Reddiar *v.* State of Madras.

Constitution of India, Art. 226—Scope—Question essentially one of breach of contract—Application for Mandamus—Non-maintainability.

Where in an application for the issue of a Writ of Mandamus under Art. 226 of the Constitution, the question is one essentially arising out of a breach of contract by the Government, the petitioner will not be entitled to ask for a Writ of Mandamus to compel the Government to conform to the agreement already arrived at between the parties; i.e., not to commit breach of the contract. (1954) II M.L.J. 429 S.C. followed.

Mr. *T. M. Venugopal Mudaliar* for Petr.

The Spl. Govt. Pleader and Messrs. *B. Lakshminarayan Reddy* and *V. Lakshmipathi* for Respts.

V.C.S. ——

16—9—1955 W. P. No. 381 of 1952.

Rajagopala Ayyangar, J.

A. H. A. Rahiman *v.* The Collector of Customs.

Constitution of India, Art. 226 and Sea Customs Act, Ss. 188 and 167 (8)—Jurisdiction of the High Cour in Writ applications —Order of Collector levying penalty—Absence of notice to aggrieved party to show cause against — Contravention of principles of natural justice—Liability of the order to be quashed—Appeal to Central Board of Revenue—Effect—*Mens Rea* in offences under the Act.

In an application under Art. 226 of the Constitution for the issue of a writ of certiorari to call for and quash the procceedings of the Collector of Customs imposing a penalty for contravening import regulations, it was contended that the impugned order was vitiated by lack of jurisdiction as the procedure followed in passing that order was in contravention of the principles of natural justice. A preliminary objection was taken on behalf of the Collector that the High Court could not entertain the petition as the petitioner had filed an appeal to the Central Board of Revenue which is the Chief Customs Authority under S. 188 of the Sea Customs Act and they had confirmed the order and that therefore the original order must be deemed to have merged in the appellate order which alone could be the subject of attack in a Court of law and that the Madras High Court would have no territorial jurisdiction under Art. 226 over the Central Board of Revenue functioning at New Delhi,

Held: the petitioner in this case merely seeks to quash the order of the Collector and if that order was a nullity in that the procedure dictated by natural justice was not followed, there was no order which could be the subject of confirmation by the appellate authority. Since no notice had been given to the aggrieved party before the impugned order was passed by the Collector to show cause why the penalty should not be imposed, on that ground alone the order would not be allowed to stand. The argument on behalf of the Collector that S. 167 (8) of the Act does not require any *mens rea* to be proved for an offence under the Act, does not also have any substance, because it misses the real point that no notice had been given to the petitioner to show cause against the imposition of the penalty. The order would therefore be liable to be quashed.

Decision in W. P. No. 342 of 1953 and Saka Venkata Rao's case considered: A.I.R. 1955 Nag. 148 Referred to.

Quare: Whether the theory of the merger of an original order in an order of the appellate authority which merely refused to interfere with the order of the inferior authority, has any application to the orders of quasi-judicial Tribunals, such as the Collector of Customs and the appellate authority therefrom.

Messrs. *V. C. Gopalratnam* and *L. V. Krishnaswami Ayyar* for Petr.

The Assistant Government Pleader and Mr. *M. M. Ismail* for Respt.

SUMMARY OF RECENT CASES.

1-8-1955 W. P. No. 1056 of 1953.

Rajagopalan, J.

P. S. Srinivasa Desikachariar *v.* The Revenue Court of Tanjore being the successor of the Revenue Court, Mayavaram.

Madras, Tanjore (Tenants and Pannayals Protection) Act, (XIV of 1952) Ss. 13 (1), 8 (1) and 10 (1) (c)—Claim for damages due to default of tenant—Allegation that gross produce has suffered diminution—"Dispute" within the meaning S. 13 (1)—Inapplicability of S. 10 (1)—Deduction of harvesting and *poradi* charges under S. 8 (1)—Labour expended by the cultivating tenant and his family—Exclusion.

S. 13 (1), of Act XIV of 1952 is wide in its scope and takes in any dispute between the owners and the tenants, which has a direct bearing on the rights and obligations of the parties, statutory or contractual, as owners and tenants. That the question of claim for damages would come within the scope of S. 13 (1) of the Act is clear; similarly, if the claim of the owner is that due to the wilful default of the tenant, the actual produce, that is, the actual gross produce, had suffered diminution, that would also be a "dispute" within the meaning of S. 13 (1) of the Act.

S. 10 (1) gives a statutory right to the owner to evict a tenant on any of the grounds mentioned therein, including those mentioned in Sub-S. (c). The tenants' failure to manure the lands may render him liable for eviction from his holding under S. 10 (1) of the Act. If that was the dispute in a claim preferred by the owners, before the statutory authority, that would certainly be outside the scope of S. 13 (1), that is, a claim for eviction as such. Where, however, it was not eviction that the petitioners sought in those proceedings, but only damages in relation to the period which preceded the claim, that claim would not fall within the scope of S. 10 (1), while the relief of eviction would fall under S. 10 (1); a claim for damages would be a 'dispute' within the meaning of S. 13 (1) of the Act.

The harvesting and poradi charges referred to in S. 8 (1) would appear to refer to harvesting and poradi charges actually incurred by the tenant. It is the contribution of his own labour or that of the members of the family in the cultivation of the land that makes a person "a cultivating tenant" within the meaning of that term in S. 2 (d) of the Act. The Scheme of the Act does not provide for any claim for wages for labour contributed by the cultivating tenant either his own or that of the members of his family. Such charges, therefore, should excluded the evaluation in terms of wages of the labour expended by the cultivating tenant and by the members of his family in the harvesting and poradi operations. Of course, if any of the tenants had paid wages to any person other than himself and the members of his family for harvesting and poradi operations, those wages would certainly fall within the scope of S. 8 (1) of the Act, and those charges would have to be excluded in determining what was the produce available for division in the statutory proportion of 60 per cent and 40 per cent.

If a tenant had actually incurred the *Kanganam* charges, he would be entitled to deduct it from the actual gross produce as a part of the harvest charges which should be deducted under S. 8 (1) of the Act. If it was the owner that incurred the *Kanganam* charges, those charges should still be deducted from ascertaining the gross produce available for division: only those charges should be paid to the owner.

Messrs. *D. Ramaswami Ayyangar* and *N. K. Ramaswamy* for the Petrs.

Mr. *V. Srinivasan* for *The Special Government Pleader* for the Revenue Court of Tanjore.

V.C.S.

8-8-1955. S. A. No. 1143 of 1951.

Krishnaswami Nayudu, J.

Sholi Ammal *v.* K. C. Saptharishi Reddiar.

Madras Hindu Religious Endowments Act, S. 79-A — Right to perform services as Poojari—Applicability of the Section—Exclusion of the civil Court's jurisdiction—Scope—Non maintainability of a suit.

A claim for the right to perform certain service as poojari in a temple and to be entitled to the emoluments and benefits of the office of a poojari will fall within the scope of S. 79 of the Madras Hindu Religious Endowments Act and a dispute relating to these subjects would have to be decided by an application to the Board constituted under the Act and not in a civil suit.

The language of S. 79-A specifically excludes the jurisdiction of the civil Court, since the Board should be approached in the first instance and not the Court, for decision of a dispute of the matters enumerated in S. 79; and if the party is dissatisfied by the order of the Court, he can apply to the Court within three months from the date of such order to modify or to set aside that order. Subject to the result of such application to the Court, the order of the Board shall be final. The initial exclusion of jurisdiction of a Civil Court in matters arising under S. 79 is well expressed in S. 79-A and even the right of a person who is affected by the order to have the order tested in a civil Court is only confined to certain matters and not to all questions arising out of the matters enumerated in S. 79.

If a dispute merely related to a ritual or certain religious observances or honours which any person may claim as entitled from a temple, and not to any right to an office and its emoluments and perquisites,

the exclusion of the jurisdiction of the civil Court is complete and absolute. But in other cases even though the initial jurisdiction of the civil Court is excluded, the order of the Board can be tested before a civil Court in accordance with the procedure laid down under S. 79-A (3).

Mr. *M. R. Narayanaswami* for Appt.

Messrs. *V. S. Mayilerumperumal* and *G R. Jagadisan* for Respts.

V. C. S. ——

10—8—1955. W. P. No. 419 of 1955.

Rajagopalan, J.

Ratna Mudaliar *v.* Commissioner of Municipal Council, Villupuram

Constitution of India, Art. 226 - Decision of the Chairman of a Municipal Council vitiated by consideration of irrelevant factors—Chairman constituting himself as Judge in his own cause—Invalidity of the proceedings—Liability to be quashed—Madras District Municipalities Act, Statutory Rules framed for the conduct of Officers and Servants, R. 6—"Pending enquiry", Meaning of—Servant under suspension—If bars jurisdictron of the Commissioner to enquire.

If a tribunal or body like the Commissioner of a Municipal Council takes into consideration in a disciplinary enquiry an irrelevant factor along with factors which he could have taken into, then that would be sufficient to vitiate the exercise of his jurisdiction.

Held : on the facts, as the exercise of the jurisdiction of the Commissioner of the Municipal Council in an inquiry into the conduct under the Statutory Rules framed under the District Municipalities Act relating to the appointment and punishment of officers and servants was vitiated by the taking into account of irrelevant considerations along with relevant considerations and by the Commissionder constituting himself as a Judge in his own cause, the order of suspension passed by him against the petitioner (a teacher of a Municipal school), would have to be quashed.

R. 6 of the Rules above referred to specifically empowers the Commissioner to suspend any officer or servant pending an enquiry into his conduct and it cannot be contended that the Commissioner would have no jurisdiction to pass an order of suspension because no charges had been in fact framed and no enquiry had been yet commenced. Taking the scheme of the rules, even if an enquiry is merely contemplated, and if formal charges have yet to be framed, this jurisdiction can be exercised under R. 6 "pending enquiry"—even a contemplated enquiry.

Mr. *N. Arunachalam* for Petr.

Messrs. *K. Bhashyam* and *T. R. Srinivasan* and *The Special Govt. Pleader* for Respts.

V. C. S. ——

12—8—1955 S.A. No. 1528 of 1952.

Rajamannar, C.J.

Kathija Kutty Umma *v.* Koduvaikal Kunhi Pattumma.

Muhammadan Law — Guardianship — Transfer by a *de-facto* guardian—Invalidity —Ratification, if possible.

It is now well established that a transfer or other act relating to the property of a Muhammadan minor by a *de-facto* guardian would not bind the minor. Ratification as such, of course, is not possible, because a transaction by a *de-facto* guardian would be void and not merely voidable.

Mr. *D. A. Krishna Variar* for Appts.

Messrs. *M. K. Nambiar* and *P. S. Menon* for Respts.

V.C S. ——

16—8—1955 C.R.P. No. 545 of 1953

Somasundaram, J.

Dr. Muthurangan *v.* Dr. Ananthnarayanan.

Evidence Act, S. 162—Privilege claimed by a Government Official—Legitimacy of the claim in the interests of public—Court if can compel the Official to produce the document.

Where in an application in a pending suit to send for from the office of the Union Public Service Commission, the names said to have been selected by the Commission for a particular appointment, the Chairman of the Commission claimed privilege stating that, apart from the names of candidates selected by them for the particular posts they keep a reserve list which had to be kept secret for the proper function of the public service and that it would be detrimental to the public interests to produce the document consisting of these names before the Court, when it had been withheld from the Ministry concerned,

Held : Where a document referred to matters of State S. 162 of the Evidence Act contemplates that the Court may not even inspect the document or compel production thereof, and therefore, the privilege claimed would have to be upheld.

Messrs. *K. Veeraswami* and *G. Ramanujam* for Petr.

Mr. *S. S. Ramachandra Ayyar* and *The Govt. Pleader* for Respt.

V. C. S. ——

17—8—1955. W. A. No. 9 of 1955

Rajamannar, C.J. and Panchapakesa Ayyar, J.

Serang Abdul Khadir *v.* Rajagopala Pandarayar.

(Madras) Tanjore Tenants and Pannayals Protection Act (XIX of 1952) S. 2 (g)—Definition of 'cultivating tenant' and landowner—Scope.

The definition of the word 'Landowner' in S. 2 (g) of Act XIV of 1952 will include a receiver appointed by court who virtually represents the real owner of the property in his possession.

In the definition of a "Cultivating tenant" the words used are merely "a tenancy agreement, express or implied" and it does not specify that such agreement must be with the landowner as defined in Cl. (g). It cannot be said that though the tenants were persons who contributed their own physical labour or that of the members of their family in the cultivation of the land belonging to another, still they would not be cultivating tenants within the meaning of S. 2 (g) of the Act, merely because they were not in possession under a tenancy agreement with the landowner as such, but that their only agreement was with the lessee.

Mr. *T. R. Ramachandran* for Appt.

Mr. *V. Srinivasan* for the Revenue Court, Tanjore.

V. C. S. ——

19—8—1955 O. S. A. No. 36 of 1954.

Rajamannar, C.J., and Panchapakesa Ayyar, J.

The State of Madras *v.* The Madras Electric Tramways (1904) Ltd.

Companies Act, Ss. 162, 166, 271 and 276—Foreign Company—Voluntary winding up, if permissible.

There is nothing in Part IX of the Companies Act which expressly prohibits a foreign company from winding up, nor is there anything in S. 271 or any other provision of Part IX which excepts the provisions of S. 166, in the case of an unregistered company. Therefore, a petition by a foreign company for winding up will be maintainable.

It cannot be contended that a company can be wound up by the Court on an application by the company, only if the requirements of Cl. (1) are complied with, that is to say, only if the company has by special resolution resolved that the company be wound up by the Court. In the absence of such a resolution, even if one or other of the other conditions in Cls (ii) to (vi) is satisfied, the Directors on behalf of the company can file a petition for winding up of the company.

Where the shareholders of a foreign company are obviously not against the petition filed for winding up of the company because no one had come up to protest against the action of the Directors in filing the petition for winding up, the shareholders may be deemed to have impliedly ratified the action of the Directors and it is not necessary that the Court should adjourn the proceedings to enable the Directors to summon a meeting of the shareholders and obtain their authority.

Where the Articles of Association of a Company provided that the Directors may exercise all such powers and do all such acts and things as may be exercised or done by the Company, and are not thereby or by Statute expressly directed or required to be exercised or done by the company in or with the consent of a General Meeting, that provision would be sufficient to confer on the Directors, the power to present a petition for winding up.

The Advocate General and *The Asst. Govt. Pleader* for Appt.

Messrs. *King and Partridge* for Respt.

V. C. S. ——

19—8—1955. Appeal No. 599 of 1953.

Rajamannar, C. J., and Panchapakesa Ayyar, J.

Alagammai Achi *v.* E. S. V. R. P. L. Veerappa Chettiar.

Hindu Law—Marriage— Provision for, in a partition—Right of an unmarried girl to claim—Suit for recovery — Maintainability —Proper directions—Charge on properties —*Res judicata*—Scope.

The right of a Hindu daughter to her marriage expenses and maintenance is based on her right to, or interest in, the joint family property, and is not based on the natural obligation of a father to maintain his children and is historically a remnant of an original right to a share in the property itself, and this obligation of the family property is not affected by partition between the father and his sons, and the sons' shares on partition are liable for the marriage expenses of the daughter of the father in proportion to the sons' shares in the property divided. It is not neces-

sary that before an unmarried girl could be given a decree in a suit brought by her for her marriage expenses, that the marriage should have either been celebrated or about to be celebrated. In the circumstances of the instant case, a direction that the defendants do pay the amount decreed into the Court was held to be the proper and necessary direction ; and the plaintiff would have liberty to draw up the same when her marriage has been settled and the terms fixed up, after notice to the other side by filing an ordinary petition for payment out.

In fixing the reasonable amount of marriage expenses, the Court can make a charge on the properties obtained by the co-parceners in the partition, for the marriage expenses of the unmarried girl which had not been provided for.

The disposal of an earlier suit brought by the mother of an unmarried girl for partition and for marriage expenses of her daughter would not operate as *res judicata* in a subsequent suit brought by the daughter, when the Court had not gone into the question of marriage expenses in the earlier suit and had merely dismissed the claim of the mother for partition.

19 M. L. J. 666, 53 Mad. 84 and (1948) 1 M. L. J. 150 : Referred to.

Messrs. *K. S. Ramamurthi* and *V. Seshadri* for Appts.

Mr. *Alladi Kuppuswami* for Respts.

V. C. S. ——

23—8—1955. C. R. P. No. 649 of 1955.

Somasundaram, J.

S. Ranga Rajendran *v.* S. K. A. R. S. M. Ramanathan Chettiar.

C. P. C., O. 21, R 66 and the Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954) S. 4 Stay of proceedings under—Proclamation of sale prior to the stay—Sufficiency.

Under O. 21, R. 66, C. P. C., if there is any variation in any of the particulars mentioned therein after the sale had been stayed, then undoubtedly there may have to be a fresh settlement of proclamation, because Sub-R. (2) of R. 66 requires the particulars to be settled after notice and if the particulars have to be altered they cannot be altered without notice to the judgment-debtor. Where, however, a proclamation of sale which had been settled after notice to the judgment-debtor was merely being republished without any alteration in the particulars mentioned in Cls. (a) to (f) of Sub-R. (2) of R. 66, no notice need be given to the judgment-debtor again after the expiration of the period of stay under Act V of 1954, as there is no fresh settlement of the terms of proclamation.

Mr. *G. Ramanujam* for Petr.

Mr. *A. Sundaram Ayyar* for Respt.

V.C.S. ——

SUMMARY OF RECENT CASES.
SUPREME COURT

Civil Appellate Jurisdiction.

C. A. No. 159 of 1953.

S. R. Das, Ag. C.J., Vivian Bose, N. H. Bhagwati, B. Jagannadhadas, T. L. Venkatarama Ayyar, B. P. Sinha and Syed Jafar Imam, JJ.

6—9—1955.

THE BENGAL IMMUNITY COMPANY, LTD.. *Appellant.*

v.

THE STATE OF BIHAR, *Respondent.*
STATE OF WEST BENGAL and others *Interveuors.*

(On appeal from the High Court at Patna).

Constitution of India, Art. 286, Scope—Power of State Legislature to levy sales tax —Transaction of sale and delivery of goods in different States—Delivery State, if can levy tax on outside dealer—Stare Decisis, *Principle of—How far applicable to the decisions of the Supreme Court—Earlier decision found to be erroneous and wrong —Jurisdiction to overrule - Extra territorial jurisdiction of State Legislatures—Scope.—Bihar Sales Tax Act (1947), S. 2 (c) and (g) —Definition of 'dealer' and 'Sale'—Invalidity of Section in so far as it operates to tax inter-State sales—Jurisdiction of the High Court under Art. 226 to issue writ of prohibition—Scope.*

Messrs. *N. C. Chatterjee, S. N. Mukherjee, V. S. Sawhney* and *R. R. Biswas* for Appt.

Mr. *Lal Narain Sinha* for Respt.

Messrs *N. C. Setalwad Attorney General, V. K. T. Chari (Advocate General, Madras), K. Veeraswami, Nittoor Srinivasa Rao (Advocate General, Mysore), Taikkad Subramania Ayyar, T. V. R. Talachari, T. R. Balakrishnan* and others for Intervenors.

FACTS:—

The appellant company is an incorporated company with its registered Head Office at Calcutta and registered as a 'dealer' under the Bengal Finance (Sales tax) Act. The appellant has neither any agent nor manager nor office, godown, or laboratory in Bihar. The goods used to be despatched from Calcutta by Rail, Steamer or Air against orders accepted in Calcutta. Upon receipt of a notice from the Superintendent of the Commercial Taxes, Patna, requiring oppellant to apply for registration and submit returns, the appellant denied its liability and eventually after some correspondence the Sales-Tax Authorities at Bihar finally called upon the appellant company to comply with its terms and ihreatend that in default of compliance, steps for assessment would be taken according to their best judgment. The appellant filed a petition in the High Court at Patna under Art. 226, characterising the notice as *ultra vires* and entirely illegal and prayed for an appropriate writ or order quashing the proceedings of the State of Bihar levying and realising the tax, as not lawfully leviable on the petitioner. The respondents did not controvert the allegations of fact made by the petitioner.

The High Court dismissed the petition, but issued a certificate granting leave to appeal to the Supreme Court of India. The contention was repeated on behalf of the State of Bihar that the jurisdiction under Art. 226 of the Constitution could not be invoked in such a case and the petition would be liable to be dismissed on the mere ground that the appellant had other remedies by pursuing those provided under the Act, by way of appeal, revision, etc.:

Per Das, Ag. C.J.) expressing the opinion of the majority, consisting of His Lordship, *Vivian Bose, Syed Jafer Imam and Bhagwati, JJ.*

Held: In the first place...the notice, calling upon the appellant company to forthwith get itself registered as a dealer, and to submit a return and to deposit the tax in a treasury in Bihar, places upon it considerable hardship, harassment and liability which, if the Act is void, under Art. 265 read with Art. 286, constitute, *in praesenti*, an encroachment on and an infringement of its right which entitles it to immediately appeal to the appropriate Court for redress. In the next place, as was said by this Court in *Commissioner of Police, Bombay v. Gordhandas Bhanji* (1), when an order or notice emanates from the State Government or any of its responsible officers directing a person to do something, then although the order or notice may eventually transpire to be *ultra vires*

(1) (1952) 3 S.C.R. 135 at p. 148, 149 =65 L.W. 212 S.C.

and bad in law, it is obviously one which *prima facie* compels obedience as a matter of prudence and precaution. It is, therefore, not reasonable to expect the person served with such an order or notice to ignore it on the ground that it is illegal, for he can only do so at his own risk and peril. This Court has said in the last mentioned case that a person placed in such a situation has the right to be told definitely by the proper legal authority exactly where he stands and what he may or may not do. The remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless, if the Act which provides for such remedy is itself *ultra vires* and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the powers of the legislature which enacted it and as such void and prays for appropriate reliefs under Art. 226. The High Court was not right in holding that the petition under A t. 226 was misconceived or was dot maintainable. It will, therefore, have to be examined and decided on merits ...."

On the question whether the Supreme Court can re consider its own prior decision in *The State of Bombay* v. *United Motors Ltd.* (1),

Held : " In a country governed by a federal Constitution, such as the United State of America and the Union of India are, it is by no means easy to amend the Constitution if an erroneous interpretation is put upon it by this Court. (See Art. 368 of our Constitution). An erroneous interpretation of the Constitution may quite conceivably be perpetuated or may at any rate remain unrectified for a considerable time to the great detriment to public well being. The considerations adverted to in the decisions of the Supreme Court of America are, therefore, apposite and apply in full force in determining whether a previous decision of this Court should or should not be disregarded or overruled......"

"It is needless for us to say that we should not lightly dissent from a previous pronouncement of this Court. Our power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well being in the light of surrounding circumstances of each case brought to our notice but we do not consider it right to confine our power within rigidly fixed limits as suggested before us.......

Further the doctrine of *stare decisis* has hardly any application to an isolated and stray decision of the Court very recently made and not followed by a series of decisions made thereon. The problem before us does not involve overruling a series of decisions but only involves the question as to whether we should approve or disapprove, follow or overrule, a very recent previous decision as a precedent. In any case, the doctrine of *stare decisis* is not an flexible rule of law and cannot be permitted to perpetuate our errors to the detriment to the general welfare of the public or a considerable section thereof......."

"In our judgment, the majority decision in *The State of Bombay* v. *The United Motors (India) Ltd.*, is, in the circumstances, alluded to, open to review and we are entitled to re-examine Art. 286 in order to ascertain its true meaning, scope and effect so far as it is necessary for the purposes of this appeal and we proceed on this basis......".

After corsidering the position of the law of taxation on sales or purchases of goods prior to the enactment of the Constitution with reference to the theory of territorial nexus on which the various States had been relying for the levy of sales tax, (as pointed out in The United Motors Case) His Lordship proceeded:

"While the Constitution-makers by Art. 246 (3) read with entry 54 in List II of the Seventh Schedule to the Constitution conferred power on the Legislatures of Part A and Part B States to make law with respect to "Taxes on the sale or purchase of goods other than newspaper", they

(2) (1953) S.C.R. 1069=66 L.W. 577 S.C.

at the same time by Art. 286 clamped on that legislative power several fetters. Broadly speaking, the fetters thus placed on the taxing power of the States are that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place, (a) outside the State, or (b) in the course of import or export, or (c) except in so far as Parliament otherwise provides in the course of inter-state trade or commerce, and lastly (d) that no law made by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent. It should be noted that these are four separate and independent restrictions placed upon the legislative competency of the States to make a law with respect to matters enumerated in entry 54 of List II. In order to make the ban effective and to leave no loophole the Constitution makers have considered the different aspects of sales or purchases of goods and placed checks on the legislative power of the States at different angles.......

"The language employed in framing the Explanation, however, has given scope for argument to Counsel and presented considerable difficulties to the Court in ascertaining its purpose and intendment. If the Explanation simply said "For the purposes of Sub-Cl. (a), a sale or purchase shall be deemed to have taken place outside a State when the goods have actually been delivered for the purpose of consumption in another State, notwithstanding the fact, etc., etc.," then none of the difficulties would have arisen at all. But why, it is asked, did the Constitution makers seek to explain what was an outside sale or purchase by saying that a sale or purchase was to be deemed to take place inside the particular State mentioned in the Explanation? Was the purpose of the Explanation only to explain what was on outside sale or purchase or was it also its purpose to allot or assign a particular class of sales or purchases of the kind mentioned therein to a particular State so as to put the question of *situs* of the sales or purchases of that description beyond the pale of controversy? These are questions which arise and are raised because of the somewhat involved language of the Explanation. Four different views as to the true meaning and effect of the Explanation have been suggested for our consideration and arguments have been advanced for and against the correctness of each of them. In the view we have taken, it is not necessary for us to express any final opinion in the matter. We propose accordingly to note the possible views and record very briefly the criticisms relating to each of these views and the suggested answers to such criticisms.......

After considering the four views and the respective criticisms on each of them, His Lordship proceeded :

"........As we have already stated, we do not desire, on this occasion, to express any opinion on the validity claimed for or the infirmition imputed to any of these several views, for, in our opinion, it is not necessary to do so for disposing of this appeal. Whichever view is taken of the Explanation, it should be limited to the purpose the Constitution makers had in view when they incorporated it in Cl, (1). It is quite obvious that it created a legal fiction. Legal fictions are created only for some definite purpose. Here the avowed purpose of the Explanation is to explain what an outside sale referred to in Sub Cl. (a) is...... "......The operative provisions of the several parts of Art. 286, namely Cl. (1) (a), Cl. (1) (b) (Cl. (2) and Cl. (3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another. On a careful and anxious consideration of the matter in the light of fresh arguments advanced and discussions held on the present occasion, we are definitely of the opinion that the Explanation in

Cl. (1) (a) cannot be legitimately extended to Cl. (2) either as an exception or as a proviso thereto, or read as curtailing or limiting the ambit of Cl. (2). Indeed, in the *The State of Bombay* v. *The United Motors (India) Ltd.*, (*supra*) at pp. 1083-1084 and again at p. 1086 the majority judgment also accepted the position that the Explanation was not an exception or proviso either to Cl. (1) (a) or to Cl. (2). If, therefore, the Explanation cannot be read into Cl. (2) because of the express language of the Explanation and also because of the difference in the subject matter of the operative provisions of the two clauses, then it must follow, that, except in so far as Parliament may by law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-State trade or commerce and irrespective of whether such sales or purchases do or do not fall within the Explanation. It is not necessary, for the purposes of this appeal, to enter upon a discussion as to what is exactly meant by Inter-State trade or commerce or by the phrase " in the course of ", for it is common ground that the sales or purchases made by the appellant company which are sought to be taxed by the State of Bihar actually took place in the course of Inter-State trade or commerce. Parliament not having by law otherwise provided, no State law can, therefore, tax these sales or purchases, that is to say, Bihar cannot tax by reason of Cl. (2) although they fall within the Explanation, and other States cannot tax by reason of both Cl. (1) (a) read with the Explanation and Cl. (2). This conclusion leads us now to consider the arguments by which the respondent State and the intervening States which support the respondent State seek to get over this position........."

After considering the reasoning of the Supreme Court in the United Motor's case, *His Lordship expressed his inability to accept it for the following reasons* :

"........What is an Inter-State sale or purchase continues to be so irrespective of the State where the sale is to be located, either under the general law when it is finally determined what the general law is, or by the fiction created by the Explanation. The *situs* of a sale or purchase is wholly irrelevant as regards its Inter State character. We find no cogent reason in support of the argument that a fiction created for certain definitely expressed purposes, namely, the purposes of Cl. (1) (a) can legitimately be used for the entirely foreign and collateral purpose of destroying the Inter-State character of the transaction and converting it into an Intra-State sale or purchase. Such metamorphosis appears to us to be beyond the purpose and purview of Cl. (1) (a) and the Explanation thereto. When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been the actual facts from the start. Now, even the *situs* of a sale or purchase is in fact inside a State, with no essential ingredient taking place outside, nevertheless, if it takes place in the course of inter State trade or commerce, it will be hit by Cl. (2). If the sales or purchases are in the course of inter-State trade or commerce, the stream of inter State trade or commerce will catch up in its vertax all such sales or purchases which take place in its course wherever the *situs* of the sales or purchases may be. All that the Explanation does is to shift the *situs* from point A in the stream of Point X, also in the stream. It does not lift the sales or purchases out of the stream in these cases where they form part of the stream. The shifting of the *situs* of a sale or purchase from its actual *situs* under the general law to a fictional *situs* under the Explanation takes the sales or purchases out of the taxing power of all States other than the State where the *situs* is fictionally fixed...That is all that Cl. (1) (a) and the Explanation do. Whether the delivery State will be entitled to tax such a sale or

purchase will depend on the other provisions of the Constitution. The assignment of a fictional *situs* to a sale or purchase has no bearing or effect on the other aspects of the sale or purchase, e.g., its inter-State character or its export or import character which are entirely different topics. This fixing of a *situs* for a sale or purchase in any particular State either under the general law or under the fiction does not conclude the matter. It has yet to be ascertained whether that sale or purchase which by virtue of the Explanation has taken place in the delivery State was made in the course of inter-State trade or commerce. For this purpose the Explanation can have no relevancy or application at all......"

Considering the scope of the Explanation, His Lordship observed:

"...Take, for instance a case where both the seller and the buyer reside and carry on business in Gurgaon in the State of Punjab. Let us say that the seller has a godown in the State of Delhi where his goods are stored and that the buyer has also a retail shop at Connaught Circus, also in the State of Delhi. The buyer and the seller enter into a contract at Gurgaon for the sale of certain goods and a term of the contract is that the goods contracted to be sold will be actually delivery from the seller's godown to the buyer's retail shop, both in the State of Delhi, for consumption in the State of Delhi. Pursuant to this contract made in Gurgaon in the State of Punjab, the buyer pays the full price of the goods at Gurgaon and the seller hands over to the buyer also at Gurgaon a delivery order addressed to the seller's godown-keeper in Delhi to deliver the goods to the buyer's retail shop. As a direct result of this sale the seller's godown-keeper, on the presentation of this delivery order, actually delivers the goods to the buyer's retail shop at Connaught Circus for consumption in the State of Delhi....

The transaction would fall squarely within the Explanation and yet it would not come within Cl. (2), for there is no movement of the goods across the border of any State as both the seller and the buyer are in the same place. Surely, the Explanation will *in praesenti*, govern such cases irrespective of whether Parliament has lifted the ban under Cl. (2). If these postulates are accepted, then by virtue of Cl. (1) (a) read with the Explanation, the State of Delhi alone will be entitled to impose a tax on such a sale or purchase and the State of Punjab will be precluded from doing so by reason of the fictional *situs* assigned to such a sale or purchase by the Explanation, although the contract was made, price was paid and symbolical or constructive delivery of the goods by the handing over of the delivery order took place in Gurgaon in the State of Punjab.

"There can be no doubt that sales or purchases of this kind to or from one dealer to another dealer actually form the bulk of inter State trade or commerce. To take them out of Cl. (2) will be to make the protection of inter State trade or commerce wholly illusory and to rob Cl. (2) of the best part of its content and utility.

"Until Parliament by law made in execise of the powers vested in it by Cl. (2) provides otherwise, no State can impose or authorise the imposition of a tax on sales or purchases of goods when such sales or purchases take place in the course of inter-State trade or commerce and the majority decision in *The State of Bombay* v. *The United Motors (India) Ltd.*, (Supra) in so far as it decides to the contrary cannot be accepted as well founded on principle or authority x x x"

"The charging section of the Act read with the relevant definitions cannot operate to tax inter-State sales or purchases and it must be held that as Parliament has not otherwise provided, the Act (Bihar Act) in so for as it purports to tax the sales or purchases that take place in the course of inter-State trade or commerce, is unconstitutional, illegal and void......".

"......In these circumstances, it is difficult to say that the scheme of taxing inter-State sales forms such an

integral part of the entire scheme of taxation of sales or purchases of goods as to be inextricably inter-woven with it....The result, therefore, is that this appeal must be allowed and we issue an order directing that, until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing Sales tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State trade or commerce although the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar."

Per Bhagwati, J.

Expressing his agreement with the leading judgment of the Chief Justice on behalf of the majority, His Lordship considered whether the Supreme Court could overrule its own prior ruling and stated thus :

"......We are concerned with the construction of the provisions of the Constitution which it will be almost impossible to amed. The House of Lords considered itself bound by its previous decisions, because it felt that the Act of Parliament could set right an erroneous decision of the House by enacting appropriate legislation. But the High Court of Australia as well as the Supreme Court of the United States felt themselves free to reconsider their earlier decisions because of the practical impossibility of correcting of erroneous decisions through legislative action. They considered it their bounden duty to construe the constitutional provisions and be guided by the provisions of the Constitution itself and not by what had been their earlier decisions on the question of its construction. The only safeguard which they put on the exercise of such powers of reconsideration was that the earlier decision should be manifestly wrong or erroneous. We here also are concerned with the construction of the provisions of the Constitution which cannot be amended so easily and if we come to the conclusion that the earlier decision was manifestly wrong or erroneous and that public interest demanded that the same should be reconsidered we should not have the slightest hesitation in doing so. We therefore approach the consideration of the earlier decision of this Court in the Bombay Sales Tax Appeal bearing in mind the principles above enunciated...... .

After discussing the legal position prior to the enactment of the Constitution and the nexus theory with regard to the levy of sales tax by the various States, His Lordship proceeded to give his reasons for taking a different view from that taken by him in the previous case, as follows :

"......It may be observed that in the Bombay Sales Tax Appeal the question of the territorial connection or nexus was not directly in dispute, and in *Poppatlal's case* (1) referred to above, it was taken as decided by this Court in the Bombay Sales Tax Appeal that the theory of territorial connection or nexus which has been mainly applied in income-tax cases is also applicable to sales tax legislation being quite distinct. The theory of territorial connection or nexus was not put to test at any time prior to the enactment of the Constitution and it is not necessary also for us to give a definite pronouncement on the subject. Suffice it to say that there was this evil which was rampant in the pre-Constitution period by reason of the various States fastening upon one or more ingredients of the sale and arrogating to themselves the power to tax sales or purchases of goods by reason of the territorial connection or nexus which they claimed to have with one or more of the ingredients of the sale provided, however, that a sale or purchase ultimately did take place either within their territories or anywhere else. It was this evil amongst others which was sought to be remedied by the Constitution-makers when they came to enact Art. 286 of the Constitution.......

"......It would, therefore, appear that the Constitution-makers had in enacting the Explanation the one and only motive of negativing the territorial connection or nexus theory and

(1) 1953 S.C.R. 677=66 L.W. 573 S.C.

replacing it by the *situs* theory and fixing the *situs* or location of the sale or purchase within the State in which the property in the goods passed by reason of such sale or purchase. While doing so, they also created a legal fiction whereby in the competition between what may be called the title State and the delivery State the delivery State was given the power to impose a tax on sale or purchase of goods where the goods had actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State. If the object to be achieved was the relief of the consumer from the burden of multiple taxation that object could only be achieved by subjecting him to taxation at the instance of one State only and not by more States than one and to that extent the view that both the title State and the delivery State would be entitled to impose the tax on the sale or purchase falling within the Explanation was clearly erroneous, the only State which would be in a position to tax the sale or purchase in question being the State in which the goods had been actually delivered as a direct result of such sale or purchase for the purpose of consumption therein......"

"...But until that ban was lifted by appropriate legislation by the Parliament, the ban imposed under Art. 286 (2) was absolute and no transaction of sale or purchase of goods where such sale or purchase took place in the course of inter-State trade or commerce could ever be made the subject-matter of taxation at the instance of a State Legislature. The Explanation to Art. 286 (1) (a) being expressly for the purpose of Sub-Cl. (a), *i.e.*, for the purpose of determining what transaction of sale or purchase was outside the State or inside the State as above stated could not be read into Art. 286 (2) nor could it be read as an exception or proviso to Art. 286 (2). Reading it as such exception or proviso would be contrary to the express terms of the Explanation and would also stultify the purpose of the enactment of Art. 286 (2) thus taking a large slice out of the transaction falling within that category. The rule as to the exclusion of the general provision by a special provision would also not apply for the simple reason that the object of Art. 286 (1) (a) and the Explanation thereto is quite distinct from the object of Art. 286 (2) and the objects being quite different, these provisions do not cover the same subject-matter, and therefore, there would be no occasion for the application of that rule of construction. To this extent the view taken by me in the Bombay Sales Tax Appeal that the Explanation to Art. 286 (1) (a) was an exception or proviso to Art. 286 (2) was clearly erroneous."

"........There are as many as 21 Sales Tax Acts to be found in the Manual of Sales Tax Acts and if a dealer in one State was going to be held amenable to the levy of Sales Tax at the instance of all the other States it would mean that he would have to ascertain from the purchaser in each of the transactions of sale which he enters into, the State to which the purchaser belongs, whether the purchaser is purchasing the goods for the purpose of consumption within the that State, to get himself registered as a dealer in that State, to maintain his books of account with a view to produce them and subject them to inspection by the Sales Tax Authorities in that State, to submit returns of the Sales Tax recovered by him from the purchaser in that State before the Sales Tax authorities of that State and make himself liable for the non-observance of the various requirements of the Sales Tax Act enacted by that State......"

"......It will be easy to understand that if those were the circumstances attendant upon his business the dealer may as well close down his business rather than submit to all this harassment at the hands of the various States. The free flow of trade, commerce and intercourse throughout the territory of India will be thoroughly choked up and we are quite sure that neither the Constitution makers nor the majority judgment in the Bombay Sales Tax Appeal would ever have contemplated these consequences...."

"........If, however, the majority judgment be construed to have said that the seller could be subjected to the levy of a Sales Tax at the instance of the delivery State in the case of transactions covered by the Explanation to Art. 286 (1) (a), I am of the opinion that it was clearly erroneous and public interests demand that the same should be reversed."

"Art. 286 (2) puts an absolute restriction on the taxing power of the States where transactions of sale or purchase take place in the course of inter-State trade or commerce unless and until the ban is lifted by Parliament within the terms thereof and until such ban is lifted, no delivery State within the meaning of the Explanation to Art. 286 (1) (a), much less the other States, are in a position to impose a tax on transactions of sale or purchase covered by the Explanation."

(Per Jagannadhadas, J. dissenting)

"........In the absence, of any clear provision in the Constitution and in view of the fact that this Court has historically succeeded to the pre-existing Federal Court and the Judicial Committee of the Privy Council, we cannot deny to this Court, the competence to reconsider its prior decisions. But, it does not follow that such power can be exercised without restriction or limitation or that a prior decision can be reversed on the ground that, on later consideration the Court disagrees with the prior decision and thinks it erroneous. It would appear, therefore, that the power of reconsideration of a prior decision is somewhat freely exercised by the Supreme Court of America in Constitutional cases. The reason for such free exercise, or to some extent, does not exist under our Constitution. . . ."

"........It does not appear to me, therefore, right to rely upon the American practice as a safe guide to determine our practice on the question as to the binding character of a judicial precedent. Neither, are we bound to adopt the very rigid rule which the House of Lords has formulated for its own practice ;...... the Problem of interpreting a written Constitution does not generally arise before it."

"......What a previous decision has determined, must be presumed to be right unless it can be pronounced to be perverse or manifestly wrong. It is, therefore, a strong thing to characterise a previous decision as erroneous where, even on reconsideration, no unanimity is reached and the previous view is supported by a substantial minority. Nor can the mere fact of one of the prior learned Judges having gone back on his views be any criterion to determine which out of his two views is erroneous. It is not for this Court now to choose between the alleged hardship of the business community and the interests of the concerning State and treat the former as a ground for reconsideration.........The proper course for this Court, therefore, is to adopt the attitude of Justice Dixon in the case in *Attorney-General for N. S. W.* v. *The Perpetual Trustee Co. Ltd.*, (1) wherein notwithstanding that he came to a contrary conclusion, he declined to disturb the prior decision. The case for not distrubing the prior decision is all the stronger, where, as happens in the present case, no unanimous opinion could be reached in favour of overruling the prior decision...... For all the above reasons, I am quite clear in my mind that the view taken in the prior decision, viz., that the consuming State has the present power to tax a fictional inside sale which falls within the scope of the Explanation and that the said power is not affected by Art. 286 (2) and that Art. 286 (2) cannot be construed as over-riding Art. 286 (1) (a) read with the Explanation, is correct and that there is no reason to depart from that decision."

(To be continued)

(1) 85 C. L. R. 237=65 L.W. 573 S.C.

(Continued from previous page).

"........I am doubtful whether, as between the component States of a Union of the kind, of extra-territoriality in the sense of the doctrine that one nation does not act in aid of the revenue laws of another (and foreign) nation.

The territory of one State is not a foreign territory in respect of another State, when freedom of movement and a number of other common fundamental rights are guaranteed.

I do not, however, wish to go into the matter further because even if the course of the administration of sales-tax, of the kind permissible, in the view of Art. 286 which the prior decision has accepted, there emerges the element of extra-territorial operation of such a tax, that by itself can be no reason for negativing the construction of Art. 286 (1) and (2) above indicated. The question, therefore, of extra-territoriality is not germane for construction of Art. 286. At the present state we are not concerned with the enforcement of the levy of the assessed tax but with assessment of the tax.

(Per Venkatarama Aiyar, J. dissenting.)

" The existence of another remedy is a very material circumstance to be taken into account when the Court is called upon to issue a writ of *certiorari*, but wholly different considerations arise when the writ asked for is prohibition. Writ of prohibition is issued whenever a subordinate Court or Tribunal usurps jurisdiction which does not belong to it, and when that has been shown, the issue of the writ, though not of course, is of right and not discretionary.........But here, the contention of the appellant is that the statute itself is void in so far as it authorises the imposition of a tax on dealers who are not residents within the State or do not carry on business there, and that, in consequence, the proceedings taken under S. 13 (5) of the Act should be restrained on the ground of want of jurisdiction. It is no answer to this contention that the appellant should seek redress through the channels provided in the Act therefor. Indeed, the contention that the Act is *ultra vires* is not one which the Tribunals constituted under the Act, whether original, appellate, or revisional, could entertain, their duty being merely to administer the Act. It is sufficient for the purpose of this appeal to hold that a writ of prohibition should issue, if the appellant establishes that the proceedings taken against it under S. 13 (5) of the Act are without jurisdiction. The contentions urged in support of that position must now be examined."

"......The body of Art. 286 (1) (a) and the Explanation together form parts of a single enactment charged with a single purpose and to refer to it either as negative or positive in character can only be a partial and not an accurate statement of the true position. It is no doubt true that Art. 286 (1) (a) assumed that there is in the State a power to tax *aliunde*, and then proceeds to restrict it. But it is not inconsistent with this to construe the Explanation as positive in character. The problem of multiple taxation, which it is the object of the enactment to avoid, is possible only when the sale is of an Inter-State character, and when the Explanation enacts that in such cases the sale shall be deemed to have taken place in the delivery State, that is at once a recognition and a declaration by the Constitution that delivery is sufficient nexus on which the State can tax the sale under Entry 54. The object of thus declaration was to remove the question from the arena of controversy and settle it once and for all. It is this a positive enactment and not the less so, because it is declaratory in character and it is also restrictive in that it takes away by necessary implication the power of taxation on the basis of other nexi which other States would have had under Entry 54. No purpose would be served by entering into a subtle disputation as to whether the Explanation conferred a new and substantive power, or whether it affirmed an existing power. In either case, the power of the

delivery State to tax could not be challenged."

"........The position may thus be summed up: Art. 286 (2) applies to sales in the course of Inter-State trade. The sales which fall within the Explanation are Intra-State sales. The grounds covered by the two provisions are distinct and separate. Each has operation within its own sphere, and there is no conflict between them. The combined effect of all these provisions is that States can tax sales in the course of Inter State trade if they fall within the Explanation. This conclusion is reached, it will be seen, not by reading the Explanation into Art. 286 (2) as a sort of exception but giving to all the provisions the status of independent enactments and determining what, on a construction of the language, their respective spheres of operation are."

"......Conceiving Inter-State trade as a stream flowing from point A in the selling State to a point B in the delivery State, it was argued that what the Explanation did was to shift the *situs* of the sale from point A to point B, that the stream was still there despite the shifting and that the sale therefore did not cease to be in the course of Inter-State trade. With respect, the fallacy in this argument lies in thinking that after the shifting of the *situs* from point A to B, the sale could be regarded as one in the course of Inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of Inter-State trade. Thus, if X, a merhant in State A goes to State B, purchases goods there and transports them into A, there is undoubtedly a movement of goods in Inter State commerce. But that is not under any contract of sale. X might be entitled under Art. 301 to certain rights in the matter of transportation. But Art. 286 (2) has no application, as there is no sale in the course of Inter State trade or commerce. In the same illustration, if X after transporting the goods into State A sells them, then also there is no sale in the course of Inter-State trade. It is true that there is a sale, and there is also a movement of goods from one State to another. But that movement has not been under the sale, there having been no sale at the time of transportation."

"........Having carefully considered the arguments addressed by the learned Counsel appearing for the parties to the appeal and for the interveners, I am clearly of opinion that the sales falling within the Explanation are, by reason of the fiction enacted therein Intra-State sales, that accordingly they fall outside the ambit of Art. 286 (2) and are unaffected by the prohibition contained therein."

"......There is good reason for holding that this Court has the power to reconsider, in appropriate cases, a previous decision by it.........But one principle stands out prominently above the rest, and that is that in general, there should be finality in the decisions of the highest Courts in the land, and that is for the benefit and protection of the public.......If that is the correct position, then the power to reconsider is one which would be exercised very sparingly and only in exceptional circumstance, such as when a material provision of law had been overlooked, or where a fundamental assumption on which the decision is based turns out to be mistaken."

"...The question then resolves itself to this. Can we differ from a previous decision of this Court, because a view contrary to the one taken therein appears to be preferable ? I would unhesitatingly answer it in the negative, not because the view previously taken must necessarily be infallible but because it is important in public interest that the law declared should be certain and final rather than that it should be declared in one sense or the other."

"......On a construction of Arts. 245 (1) and 246, therefore, it will be

difficult to come to any other conclusion than that a sales tax legislation of a State which is otherwise valid is not *ultra vires* on the ground that the person proposed to be taxed is not resident within the territorial limits of the State."

"........The conclusion is inescapable that the powers of the Union and the State under Ss. 99 (1) and 100 of the Government of India, Act, as also under Arts. 245 (1) and 246 in respect of the matters mentioned in their respective lists have the same content and quality, and that if legislation with extra territorial operation is within the competence of the Union, it is equally within the competence of the State."

"......I must hold that the impugned Act in so far as it authorises the imposition of tax on sales falling within the Explanation to Art. 286 (1) (a) is neither *ultra vires* the powers of the State Legislature nor bad on the ground that it is extra territorial in its operation."

(Per Sinha, J. dissenting.)

"......We are all agreed that in a proper case it is permissible for this Court to go back upon its previous decision; but we are again divided as to whether this is a fit occasion for reviewing its previous decision. For the reasons given by my brothers, Jagannadhadas and Venkatarama Ayyar, JJ., I would agree with them in holding that sufficient grounds have not been made out for overruling that decision which had been taken after hearing all the parties interested in the result of the case."

"......In my opinion, for the reasons given by my learned brother Venkatarama Aiyar, J., the better view is that Cl. (2) of Art. 286 of the Constitution is subject to Art. 286 (1) (a) read with the Explanation. On the whole, therefore, I would agree with the view that the previous decision of this Court in 1953 S. C. R. 1069 should continue to hold good and govern the present controversy also."

REVIEW.

"LAWYER"--A Quarterly.

We have pleasure in introducing to our readers the above publication of the Madras State Bar Federation, a copy of which has been received by us for review. We are glad that the Federation has been able to realize one of its chief ambitions with such remarkable success and that our expectations in the anticipatory write-up at page 79 of our Part 32 have been well fulfilled. This new venture, it needs little to be said, marks a landmark in the history of legal journalism in our country, in its being almost the first and the only periodical which is published and owned by a Federation of Lawyers. In this publication is presented with a proper and proportionate blending, a combination of all the useful features of a *magazine* and a *journal* and we have no doubt that it is bound to be of immense help to all sections of the reading public, not only for the valuable instruction that it imparts to its readers and the varied information that it provides, but also for the high standard of literature that it contains.

The editorial column of the first number covers as many as four subjects of great interest and importance to the litigant public and the legal profession, and the views expressed therein truly reflect the opinion of the concerned section of our population on each of those matters. The following pages contain contributions which include articles from persons of eminence, lawyers, Judges past and present, professors and literati covering a variety of subjects. It should be a matter of pride and pleasure for the members of the legal profession that in Dr. C. P. Ramaswami Ayyar from whose pen has the first Article come on "the Making of a Lawyer", they have got one who, in spite of having resigned from practice more than two decades

ago, has been evincing continued interest in their welfare and progress. As a general statement of fact, it is no exaggeration to say that any activity or venture of an association of lawyers is not complete without the participation in it in some form or other of Dr. C. P., —and his benediction unfailingly leads to success.

Explaining the development of the Rule Law in its historic relation to each of the three countries, viz., the British Isles, the United States of America and the Indian Union, Professor G. C. V. Subba Rao ponits out in his learned and thought-provoking article that the recent decision of the Supreme Court in *Kapur and others* v. *State of Punjab* has not considered the full implications of this doctrine. We find that this criticism also gains support in another article from Sri S. Rajagopalan, though on different reasoning. Such critical retrospects of case-law are, we are sure, bound to be of immense value to the lawyers and the Judges alike in future when such points once again come up for decision.

Sri P. Venkataramana Rao indicates in his article the position of lawyers with reference to the concept of a Socialistic pattern of Society and points out the need now all the more than ever before, for lawyers to take active part in social service and public activities and the words of advice from an eminent person like him are bound to be of immense benefit to the youths in the profession. The interests of jurists among the readers are satisfied by the contributions of Professor Alexandrowicz-Alexander on the Admissibility of Constitutent Assembly Debates in aid of the interpretation of the Constitution and of the Advocate General of Madras on 'Judicial Review in U. S. A., and India'. Sri R. V. Krishna Ayyar, M. L., who has served as Secretary to the Madras Legislature for many years writes on the March of Legislation and Sri M. Subbaroya Ayyar on Income tax Law and its Evolution, both of whom are authorities on the respective subjects. Sri P. Mahadevan has contributed an article on Law in English Literature which reveals a depth of learning.

The inclusion of biographical sketches of outstanding personalities in Law in a journal such as this adds to its other interesting features and we have in the first number, the portrayal of the late Sri S. Srinivasa Iyengar by three leading Lawyers viewed from three different angles, viz , from the pens of Sri K. Rajah Iyer, Sri K. Bhashyam and Sri V. C. Gopalratnam; the first, depicting the greatness of the man as studied by him during his intimate professional acquaintance, the second, recounting his experinces during his association with the departed leader in contemporary politics and the third, depicting the human and generous aspects of the late Sri S. S., as revealed to him during his initimate personal acquaintance.

The fillers and the Quips and Quirks provide the lighter side of the reading matter of the journal and are enjoyable and interesting to read. The incident about how the late Mr. Justice Coutts Trotter rendered justice in a case before him going all out of the way to help a victim of circumstances by recommending re-employment to that dismissed employee—"extra judicially", leaves a lasting impression on the mind of everyone who reads it. The serial, "Cases of General Interest" gives useful information on recent decisions of the Court of Appeal, the House of Lords and the Supreme Courts of India and the United States.

We commend this publication to everyone of our readers. The Annual Subscription for the Journal is found to be only Rs. 5 which, it must be said to the credit of the organizers, is a very moderate sum considering the wealth of information that it contains and we hope that by the generous supportof a large body of subscribers, it will soon be able to stand on its own and attain a standard which will easily give it a place along with any other first rate journal in the world.

REVIEWS.

The Constitution and Fundamental Rights by Dr. Alladi Krishnaswami Ayyar, D. Litt., Published by the Srinivasa Sastry—Institute of Politics, Mylapore, Madras, Pages 94, Price, Rs. 5.

We acknowledge with thanks receipt of a copy of the above book for review and extend our hearty congratulation to the publishers on their success in bringing out their maiden publication which contains the text of two lectures delivered by the late Dr. Alladi Krishnaswami Ayyar one of the foremost jurists of this century and the Architect of our Constitution under the auspices of the Rt. Hon'ble Srinivasa Sastri Memorial during the months of April and May, 1952. In the Appendix is included the 2nd, 3rd and 4th amendments to our Constitution and extracts from the Constitutent Assembly Debates where the speeches of Dr. Alladi on the draft constitution are fully reported.

The First Lecture gives a general survey of the Constitution and the learned lecturer meets the criticisms levelled against some of the provisions of Part III of the Constitution. He points out the difficulties that faced the draftsmen while framing these provisions and explains how the reasonable restrictions on the Fundamental Rights came to be incorporated as exceptions or provisos to the respective articles. The lecturer also deals with the scope of the jurisdiction of the Supreme Court and the State High Courts in their various capacities and shows how our Supreme Court has wider powers and jurisdiction than its American counterpart.

In the Second Lecture, Dr. Ayyar analyses each of the articles in the Chapter on Fundamental Rights and discusses critically some of the decisions rendered by our Supreme Court in the light of his analysis. The history of the enactment of the successive Amendments to the Constitution of the United States is traced and the parallel provisions thereof are explained. The foot notes contain exhaustive extracts from the decisions of our Supreme Court in recent times with the author's comments thereon.

The interpretation of the Constitution is a problem that has to be met everyday by our lawyers, Judges and legislatures and to solve it effectively and successfully one must have sound knowledge of the history, the philosophy and the intendment of each of its articles. The book under review fulfils a need that has been keenly felt by lawyers and students of the Constitutional law in this regard. That Dr. Alladi was a lawyer first and last is evident from the profuse quotations he has made from constitutional treatises like Wheare, Willis Corwin and other leading text writers. His treatment of the subject is marked by lucidity of exposition and clarity of thought and the reader is helplessly and inextricably borne away in the stream of his logic and the force of his argument supplemented by the many authorities cited by him. As pointed out in the Foreword by Dr. C. P. Ramaswami Ayyar, Dr. Krishnaswamy Ayyar has been "naturally zealous" in safeguarding all the measures of own Constitution against all attempts to criticise the Constitution like a proud parent overfond of his child. Though the price of the book may appear to be somewhat high in view of the smallness of its size, the high authority that it lends to any discussion on Constitutional problems and the attractive get-up and neat binding justifies the same.

The Law of Torts by Durga Das Basu, 5th Edition, published by S. C. Sarkar & Sons Ltd., Calcutta-12 pages about 170, price Rs. 6/-.

The difficulty of writing a good book on the Law of Torts by an Indian author lies in the fact that there is very little of Indian case-law on the subject and we have to

depend mostly on English cases for enunciation of the principles. Mr. Durga Das Basu, the wellknown author of the Commentary on the Constitution of India, has, however, made a successful effort in bringing out a systematic exposition of the salient principles underlying the Law of Torts. The book has already run into four editions and we find that nearly 10,000 copies have been published altogether, which gives a good indication of the popularity of the book. The method adopted by the author of giving the full facts of each case separately in the footnotes as illustrating the principles discussed in the main body of the book will be found to be highly useful not only for the students of the subject, but also to the busy practitioners. The latest decisions of the English Courts have been duly incorporated, while at the same time indiscriminate flooding of cases on the same subject has been well avoided. We congratulate the learned author and recommend this as a useful book for all students of the Law and for the legal practitioners.

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Expert Evidence.—(Medical and Non-medical) by Y. H. Rao assisted by Y. R. Rao, Advocates, published by Criminal Law Publications, Gudur, Pages about 470, Price Rs. 17-8-0.

This is an addition to the useful series of books brought by the learned author in recent years on the various subjects in Criminal Law which have already become familiar to the legal practioners in our State and the adjoining ones. As the author himself admits the book is a venture in the sense that it is a new attempt by a member of the Bar who cannot ordinarily be said to be expert on the subjects dealt with in the book; nevertheless, it is a matter of gratification that the author has well succeeded in his endeavour and has placed before the legal profession a very useful book expounding the basic principles of various scientific subjects in a method familiar to them. Reference to leading cases and standard works lend authority to the discussion on each of the topics. The classification of the decisions according to the various High Courts which have rendered them may be of particular use to the legal practitioners and the Courts in the respective States. The book begins with a summary of the statutory provisions with regard to expert evidence in the Indian Evidence Act in Chapter 1. The other chapters in the first part deal with the field of forensic necessity for expert evidence, the role of science in the detection and proof of crime and the probative value of the expert evidence. Parts 2 and 3 deal separately on expert evidence, classified as medical and non-medical respectively. We have pleasure in recommending this work as an indispensable addition to the library of every trial lawyer, especially to those who frequent the criminal Courts.

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Supreme Court Digest, Practice & Procedure (1950-1955) by A. N. Khanna, Advocate, Supreme Court, Published by All India Publishers Ltd., New Delhi, pages about 950, Price Rs. 20.

We are in receipt of a copy of the above book which contains a complete digest of all Supreme Court cases reported in the All India Reporter Supreme Court Section, the Supreme Court Journal and the Supreme Court Reports, between 1950-1955. The necessity for a digest such as this has been felt in recent times in view of the increasing number of decisions of the Supreme Court on the various branches of the law. We, however, feel that the omission to include references to the various other reports in our country which also publish the decisions of the Supreme Court and of the particular State High Court, detracts considerably the utility of the book to the practitioners in the various States. It is hoped that the publishers will give attention to this matter in their next edition. The book is divided into two parts, the

first containing the digest and the second containing the Rules of the Supreme Court as modified up-to-date with references to the relevant provisions of the C. P. C. The book is bound to be of much assistance to the legal profession, Law Students and the Law Courts.

SUMMARY OF RECENT CASES.

24—8—1955 S. A. No. 1580 of 1951.

Krishnasuami Nayudu, J.

Mandoolakandi Gopalan Nair *v.* Koommundakkal Maruthiyatt Narayana Kurup.

C.P.C., O. 40, R. 1—Receiver appointed by Court—Position—Suit against—Failure to implead parties actually sought to be made liable and represented by the receiver—Effect.

It will not be open to a third party to institute an action against a receiver of an estate appointed by Court during the pendency of a suit without making the persons who are sought to be made liable under the decree and who are interested in the ptoperties, as parties to the suit or execution petition. The receiver is not in the same position as the Official Assignee under the Presidency-Towns Insolvency Act or Official Receiver under the Provincial Insolvency Act, where it could be held that the insolvent's estate vests in the Official Assignee or Official Receiver. The receiver is appointed by Court by virtue of the provisions of O. 40, R. 1, and he is appointed for the protection of the estate and is not a substitute for the owners of the property so as to represent the estate for all purposes. The estate does not vest in the receiver by reason of his appointment. It may be that he may represent the parties in suits either as plaintiff or as defendant, which again is a power which the Court could confer on the receiver under O. 40, R. 1, and then only he might be considered to be a representative of the parties. He is not a representative in the sense that the rights of the parties to the estate have devolved on him or have become vested in him by reason of the order of appointment. It is not therefore open to a third party to bind the estate without seeking to make the parties who are sought to be bound as parties to the action or proceedings.

Mr. *A. Achuthan Nambiar* for Appt.

Messrs. *V. P. Gopalan Nambiar* and *P. Bhaskara Menon* for Repts.

V. C. S. ——

25—8—1955 O. S. A. No. 95 of 1955.

Rajamannar, C.J. and Panchapakesa Ayyar, J.

Rallis India Ltd., *v.* B. V. Manickam Chetty & Co.,

Arbitration—Misconduct, what is.

Where an arbitration award was set aside by the Court on the ground that the arbitrator had made the award without passing any order on the application for adjournment by one of the parties and without intimating to them that he proposed to proceed with the reference, and that party was not furnished with a copy of the rejoinder, which had been filed, but no consequential order superseding the reference was made, and one of the parties filed another application to the Court under S. 20 for making a reference ;

Held: the application would be maintainable and it is a fit case for referring the matter to arbitration under the agreement between the parties. Merely because the previous award was technically found to be bad, it cannot be said that there was any misconduct on the part of the arbitrators or that the parties had lost confidence in that arbitrator.

Messrs. *R. Narasimhachari* and *N. Varadarajan* for Appts.

Mr. *G. N. Chari* for Respt.

V. C. S. ——

25—8—1955. C. R. P. No. 2647 of 1952 and A. A. A. O. No. 250 of 1952.

Rajagopala Ayyangar, J.

R. Sumudra Vijayam Chettiar *v.* Srinivasa Alwar.

Transfer of Property Act, Ss. 64, 111 (c) and Evidence Act, S. 115—Tenant let in by a Usufructuary Mortgagee—Redemption of the mortgage—Liability of the mortgagee to give delivery of possession—Refusal of landlord to accept the tenant—Permissibility—Application by mortgagor to evict the tenant—Estoppel—Doctrine of election—Scope.

When a mortgagor puts a mortgagee in possession of property under a usufructuary mortgage, the former has a right, when he has discharged the mortgage debt, to re-delivery of the possession of the property from the mortgagee. In cases where a tenant has been inducted into the property by the mortgagee and such tenant attorns to the mortgagor and the mortgagor accepts the attornment, there would doubtless be an effective delivery of possession, which would terminate all further liability on the part of the mortgagee ; but where there is no attornment either because the mortgagor refuses to accept the person in occupation as his tenant or because though the mortgagor is willing to accept the person in possession as his tenant, the latter refuses to do so, the mortgagor is entitled to insist that *khas* possession should be delivered to him and not merely such possession as is involved by a mere direction by the mortgagee to his tenant to attorn to the mortgagor.

Under S. 111 (c) of the Transfer of Property Act "a lease of immoveable property determines where the interest of the lessor in the property terminates on the happening of any event by the happening of such an event." In the case of a usufructuary mortgage, the mortgagee's interest in the

property terminates on redemption, and a lease granted by him comes to an end at the same time. The lessee then in possession, would, on that event happening, become a trespasser and therefore cannot by any act of his own create the relationship of lessor and tenant between the mortgagor and himself.

Where however, the mortgagor has treated the tenant as holding under him and sought relief on that footing by way of eviction proceedings, he could not thereafter turn round and assert that the tenant was not let in by him and claim to treat the usufructuary mortgagee as continuing to be in possession and therefore liable to pay mesne profits by reason of wrongful occupation.

Where a man is entitled to one of two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of the one, he cannot after wards pursue the other which after the first choice is by reason of the inconsistency no longer open to him. Such cases do not require detriment to the other party as foundation for their application.

7 A.C. 845 and 1941 A.C. 1 : Referred to.

Messrs. *S. V. Venugopalachari* and *S. Venkatesan* for Petr.

Mr. *V. Devarajan* for Respt.

V. C. S. ——

26—8—1955. C. R. P. No. 1560 of 1954.

Panchapakesa Ayyar, J.

P. T. C. Kannappa Chettiar *v.* Ranganatham Chetty.

Madras Buildings (Lease and Rent Control) Act, S. 7—Eviction on the ground that premises was put to a different use—Scope — Original letting for shroff business—Manufacture of jewellery, if permissible.

Where a premises was let for carrying on a shroff business and from the out-set the tenant had been manufacturing jewels for sale in the premises to the knowledge of the landlord who never objected to the same and subsequently the landlord filed an application before the Rent Controller for eviction on the ground that the tenant had put the premises to a different use from that for which it had been taken on tenancy ;

Held: it cannot be said that the premises was put to a use different from what was contemplated at the time of letting out; in all such cases, a liberal interpretation ought to be put, in the interests of enterprise, and in order to prevent chicanery by too narrowly interpreting the scope of a business. If the business was totally different, and such as could not have been contemplated at the time of the lease, it will certainly be a strong ground for eviction, but in the present case, the tenant could not be evicted on that ground.

Messrs. *V. T. Rangaswami Ayyangar* and *T. E. Ragavachari* for Petr.

Mr. *G. R. Jagadisan* for Respt.

V. C. S. ——

2—9—1955. S. A. No. 1664 of 1951

Krishnaswami Nayudu, J.

Veerappa Konar *v.* Ayipillai.

Transfer of Property Act, S. 111—Lease and Licence—Distinction—Person in possession as licensee—Transfer of Property—Effect.

It is well-established that a licence enjoyed in respect of a property is not annexed to it and is not a transferable or a heritable right. The licence is determined on the transfer of the property affected by it. A licence is a purely personal right between the grantor and the licensee and possession by the representatives of a licensee is in no way better than that of the representatives of a tenant on sufferance, since both are mere trespassers and cannot be regarded as succeeding to any interest in the tenancy, and what is true of a tenant on sufferance is equally true of a licensee.

I.L.R 54 Mad. 554 and 81 Mad. 168 Referred to.

Messrs. *T. R. Srinivasan* and *S. Gopalaratnam* for Appt.

Mr. *M. R. Narayanaswami* for Respt.

S.C.V. ——

6—9—1955 Crl. Appeal No. 498 of 1954.

Ramaswami Gounder, J.

A. Vaidyanatha Iyer *v.* State of Madras.

I.P.C., S. 161 and Prevention of Corruption Act (XI of 1947), S. 4—Presumption under—Illegal gratification—Receipt by the accused—Proof, necessity—Mere taking of a loan, not an illegal gratification—Criminal trial— Statement of accused in defence—Probative value.

Before the presumption laid down by S. 4 of Act XI of 1947 could be drawn in respect of an offence under S. 161, I.P.C. where a public servant is charged with receiving a illegal gratification, the prosecution is bound to prove that the accused had accepted or obtained the gratification otherwise than as legal remuneration. It cannot be said that the mere taking of a loan with an obligation to repay it with interest, would fall within the meaning of the term "Gratification."

I.L.R. 1950 Allahabad, 382 Considered.

There is no rule in Criminal Law that the testimony of a witness, because he gives evidence on oath, should be preferred to the statement of the accused, which of course, is not made on oath. The accused's version can be rejected only if it can be shown that it cannot reasonably be true. If the Court is satisfied that the version of the accused can reasonably be true then, the benefit of doubt must be given to him.

Messrs. *V. L. Ethiraj, K. Venkataraman* and *S. B. Mani* for Appts.

The Public Prosecutor on behalf of the State.

V. C. S. ——

The Late Mr. B. Somayya.

While recording the passing away of the late Mr. B. Somayya we associate ourselves with the expressions of grief made by the Chief Justices of the Madras and the Andhra High Courts in the references made before them and in the Supreme Court. The legal profession in Madras will long cherish his memory, for, his career, both as a Judge and as an Advocate while at Madras and subsequently as Senior Advocate practising before the Supreme Court in New Delhi, was always marked by the admiration and affection which he commanded from one and all. His success in all the spheres was merely the recognition of his erudition and his hard work. We convey our heartfelt condolences to the members of his bereaved family.

Ex parte Orders under O. 39, R. 7 of C. P. C.

By

SRI K. V. SUBRAHMANYAM, B.A., LL.B., *Advocate, Ongole.*

1. It is a matter of common experience that in suits for dissolution and settlement of accounts of a partnership business, suits for partition and some others, the plaintiff files an application along with his plaint requesting the Court for the appointment of a Commissioner at once without notice to the opposite party for the taking of an inventory of the movable properties, consisting of jewellery, cash, silverware (in partition suits) account books, vouchers, pronotes (in account suits) and other items in the possession of defendants and to be found in a particular premises. Under O. 39, R. 7 of C.P.C., the Court has power, on the application of any party to a suit (a) to make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein; (b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and (c) for all or any of the purposes aforesaid authorise any samples to be taken or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. It will, therefore, be seen that under O. 39, R. 7 a Court is empowered to appoint a person generally called a Commissioner to take inventory of the movable property which is the subject matter of such suit, or as to which any question may arise therein and also authorise him to enter into any building or land in the possession of any other party to such suit for the above purpose. See *Chidambaram* v. *Nataraja Mudaliar and others* A. I. R. 1939 Mad. 80 : 48 L. W. 688. In *Amjad Ali* v. *Ali Hussain Johar* 6 I. C. 574, it was observed as follows : "We must consequently hold that the right to grant an inspection implies the right to make an inventory, if the Court be satisfied that the preparation of the inventory is essential, for a proper decision of the case." In *Mahammad Rasek and others* v. *Tahidunnesa and others* (1919) 52 I.C. 33, the head note runs thus : " An order made under O. 39, R. 7 of the C.P.C., directing upon an application the preparation of an inventory of the property which is the subject matter of a suit, should be made only when such inventory is essential for a proper decision of the case, and not otherwise" (page 34 Col. 2). In *Jitendra Nath Chatterjee* v. *Asoke Nath Mitter* (4), 52 I.C. 4 : 30 C.L.J. 64, the Calcutta High Court held that, although the articles were not in the custody or possession of the defendant, he nevertheless was in

a position to redeem them and produce them in Court, and that consequently the trial Court had jurisdiction to make the order for their production under O. 39, R 7 (1) (a) of the C.P.C. In *Mahadeo Ram* v. *Chamroo Prasad Sahu* (5), A.F.O.O. Appeal. No. 359 dated 5th November 1942 of 1941 (Patna) it was held that under O. 39, R. 7 the ordering of an inventory is a matter for the discretion of the Court. In *Totaram Ichharam Wani and others* v. *Dattu Mangu Wani and another* A.I.R. 1943 Bom. 143, it was held that a Judge has power under O. 39, R. 7 to give the Commissioners authority to dig up the ornaments alleged to be in the defendants' land shown by the plaintiffs for the purpose of taking possession of those ornaments.

2. Now let us see whether an order under O. 39, R. 7 can be made without notice to the opposite party. O. 39, R. 8 reads as follows :

"O. 39, R. 8 (1). An application by the plaintiff for an order under R. 6 or R. 7 may be made after notice to the defendant at any time after institution of the suit.

2. An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance."

In *Totaram Ichharam Wani and others* v. *Dattu Mangu Mani and another*, A. I. R. 1943 Bom. 143 the plaintiffs filed a suit for partition on 18th August 1941 and the learned Judge appointed *ex parte* Commissioners under O. 39, R. 7, C. P. C. with power to dig up the places on the defendants' land shown by the plaintiffs for the purpose of taking possession of ornaments. In the High Court it was argued that the said order of 18th August without notice to the defendants was contrary to the provisions of O. 39, R. 8, Beumont C. J. observed at page 144 as follows ;

"I may point out that in cases in which it is necessary to take action promptly in order to prevent property from being made away with by the defendant, the Court, before proceeding under O. 39, R. 7, can always appoint a Receiver or grant an injunction *ex parte*. The appointment of Commissioners, which was made in this case *ex parte* was really less detrimental to the defendants than would have been the appointment of the same persons as receivers. There is, therefore, no real substance in the defendants' objection that the Commissioners were appointed in the first instance without notice."

3. On the other hand, in *Sengotha and another* v. *Ramaswami* I. L. R. 7 Mad. 241, a Division Bench of the Madras High Court held that an application for an order under S. 499 C.P.C. (Present O. 39, R. 7, C.P.C. of 1908) can only be made by a plaintiff after the summons has been served and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. In that case the order was applied for on the 10th July and made on the 11th *ex parte* without notice to the defendant and without any proof to support it, while the summons was not served till the 25th July. Hence the order under S. 499 was discharged though the receiver was appointed under emergent circum stances.

4. The decision in I. L. R. 7 Mad. 241 was not brought to the notice of their Lordships of the Bombay High Court who decided the case reported in A.I.R. 1943 Bom. 143. In the Bombay case, their Lordships decided the matter taking into consideration the convenience or otherwise of the parties to the proceeding. It is true that in some cases if provisions of O. 39, R. 8, C. P. C. are strictly complied with, the purpose for which the appointment of some person under O. 39, R. 7, C. P. C. is sought for will be frustrated as the opposite party will take necessary precautions to safeguard his interests which will ultimately cause irreparable loss or injury to the petitioner. But it is also well known that considerations of inconvenience or hardships have no place in the construction of statutes and that it is not the function of the Court to add to the law where the intention of the legislature as expressed in the Statute is clear.

5. In view of the above, it is necessary that some provision is made in the C. P. C. to meet such emergencies.

Poramboke Lands in Zamindaries.

By

*SRI A. S. KUPPUSWAMI, *Advocate, Tirunelveli.*

The legal character of porambokes in a zamindari estate came up for decision in a recent case reported in 68 Law Weekly 857 before a single Judge of the Madras High Court. The issue was whether the lands in question were public ryoti or private lands of the landholder. The answer given is as follows:—The lands, "have all along been shown as poramboke lands, which, by itself, should normally exclude their ever having been ryoti lands as defined in the Estates Land Act." In other words, according to the decision, porambokes in zamindaries are normally landholders' private lands and not ryoti lands. This interpretation of the law by the High Court raises a substantial issue for consideration. It requires examination in the light of the rule of law governing ryoti or public domain lands and the landholders' private lands.

2. At the out set, the nature of the concerned lands has to be clarified. They have been registered as poramboke all along, in the landholders' accounts. They can therefore, be presumed to bear that character, since their origin, viz., the Permanent Settlement of the Zamindari. They are further described as either Nandavanams (i.e., flower-gardens) or topes (i.e., gardens). This shows that they have been cultivated. Hence they are cultivable lands at the origin. As stated in 38 Madras 108 at 111, 'whatever land does not yield revenue to Government, is usually known as poramboke, though several kinds of lands may be included in it', "the word poramboke covers unassessed waste, besides all kinds of communal poramboke—such as beds and bunds of tanks" etc. It is clear from the above, that the concerned lands in the above case were unassessed cultivable waste in their origin and have been subsequently cultivated.

3. **Legal character of waste lands** :—It is settled law that all cultivable immemorial waste is public ryoti land. As stated by Viswanatha Sastri, J., in (1952) I Madras Law Journal page 71 at page 109, the principle of the permanent occupancy rights of ryots in public lands in zamin areas, "applied not only to lands in the occupation of ryots, but also to lands relinquished by former ryots as well as unoccupied but cultivable lands, which were all considered to be public lands." In the well known *Cheekati Zamindar's case*, Subramania Ayyar, J., points out that in the case of lands "which have been lying waste from time immemorial, they too when taken up by a ryot are treated on the same footing as ordinary occupancy lands. In 1948 Mad. (I. L. R.) page 223, the Full Bench has held in reference to the reclaimed waste land in issue in that case, that "the land which was ryoti waste till 1902 and which was subsequently reclaimed and cultivated by the landholder does not cease to be ryoti land." Mr. G. S. Forbes the well known author of the Madras Estates Land Act has stated the rule of law as follows in his speech on the Estates Land Bill in the Legislative Council, quoting a despatch of the Government of India on the subject. "To exclude the growth of occupancy right on waste land would be a contravention of the customary law of the country and would be opposed to public policy."

3. **Doctrine of Private land** : As pointed out by Mr. G. S. Forbes in the speech quoted above, the origin of private lands is historical. In the words of Mr. Forbes, "these private lands represent the "savaram" lands or allotments freed from all public charges which were specifically assigned by the Musalman Government to the zamindars in settlements of revenue with them.

They were the remuneration or rather part of the remuneration which the zamindar received for collecting the Government revenue and maintaining public order in the zamindari and rendering such other services as the settlement imposed upon them. They were in a sense his freehold, so long as they remained in that category. All other lands were ryoti." Mr. Forbes' account is corroborated by the instructions dated 15th October, 1799, issued to the Collectors in regard to the Permanent Settlement. Para 23 of the Instruction, in reference to the northern districts and para 25 of the similar Instructions in reference to the southern districts refer to "all private lands, at present appropriated by the zamindars, and other landholders to the subsistence of themselves and families as well as lands held by private servants and dependants." A similar account of the historical origin of private land is also to be found in the judgment of Sundara Ayya J. in 36 Mad. 168 at 172, "sometimes, the zamindar was a descendant of a royal family, that enjoyed demesne or private lands and remained in possession of them ater the family ceased to exercise sovereign powers, but continued to have zamindary powers under Muhammadan rulers. The holder was allowed to retain these private lands as compensation for services rendered by him to the State and partly also in consideration of his being responsible for the collection and payment of the State revenue. The private land in his own occupation was itself exempt from the payment of any revenue. But the zamindar was sometimes a mere renter under the Government holding his office at his pleasure. In such cases, some land was sometimes granted to him and exempted from the payment of revenue." This description of the historical origin of private lands by Sundara Ayyar J. in 36 Mad. 168 is approved by Satyanarayana Rao, J. in the above leading F.B. case in 1952 1 M. L. J. page 71 at page 90. This historical account makes it clear that the landholder's private land at the Permanent Settlement is confined to occupied lands held by the landholder or his servants and dependants. Unoccupied poramboke waste land cannot be fairly claimed to come within this historical account of private land.

4. Thus, the statement of the law in 68 L. W. 857 that poramboke lands are normally not ryoti appears to be opposed to the principles of law governing public ryoti land as well as the doctrine of private land. The law has, therefore, to be clarified by a suitable legislative amendment. A short declaratory Act may be passed to the effect that all lands which are or have been porambokes at any time are only ryoti lands and not the landholder's private lands.

SUMMARY OF RECENT CASES.

23—9—1955. S. A. No. 1572 of 1951.
Govinda Menon, J.

Noorunnissa Bibi *v.* Syed Muhammed.

Limitation Act, Art. 120—Suit for mesne—Profits—Proper period.

Where a settlement was executed by a Mohammadan in 1935 by which he divided the properties amongst his children and retained some for himself and soon afterwards one of his sons died and his widow and children succeeded to him and in 1943, one of the daughters of the said deceased filed a suit for partition impleading the other sons of the settlor and a final decree in that suit was passed in 1947, after which this suit was brought by the surviving son of the settlor for recovery of mesne profits from the date of the death of his brother, it was contented that he would be barred by *res judicata* from maintaining this action and that the suit would be barred by the Limitation Act,

Held : failure to claim mesne profits in a partition suit will not bar a subsequent suit for the same relief. Therefore, there was neither bar of *Res judicata* nor bar under O. 2, R. 2, C. P. C.,

38 Mad. 829 : Relied on.

The proper Article of Limitation Act applicable is Art. 120 and the plaintiff would be entitled to compensation for a period of six years prior to the date of suit. In the circumstances of the case, the defendants would be deemed to have collected the income and therefore, the plaintiff should be entitled for compensation for such period.

Midnapore Zamindar's Case. 29 C.W.N. 270 : followed.

18 Cal. 10 : Explained.

Case-law considered.

Mr. *K. Vaitheeswaram* for Appts.

Mr. *G. R. Jagadisam* for Respt.

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3—10—1955. Appeal No. 76 of 1953

Govinda Menon and Basheer Ahmed Sayeed, JJ.

Venkatasubba Naicker *v.* Guruvammal.

Court Fees Act—Suit for declaration without consequential relief for possession—Maintainability.

A suit for a mere declaration without a consequential relief for possession is maintainable in certain circumstances.

30 Mad. 195 ; 36 Mad. 426 ; 35 M.L.J. 144 and 68 L.W. 160 : Referred to.

Messrs. *A. K. Pavithran* and *N. Suryanarayana* for Appts.

Mr. *T. V. Balakrishnan* for Respts.

V. C. S. ——

4—10—1955. S. A. No. 121 of 1952.

Krishnaswami Nayudu, J.

Sheik Dawood Rowther *v.* Rajasri Prathapasima Raja Sahib.

Madras Estates Land Act, S. 27—Scope—Suit for rent—Execution of Muchilika—Decree for rent at reduced rate—Binding nature in subsequent suit for rent for next year—Rate which can be claimed.

Where in respect of certain lands a Muchilika was executed by the tenant for a certain fasli and patta was issued and subsequently the tenant had been continuing and the landlord obtained a decree in a summary suit for rent at a reduced rate and for a subsequent year, another suit was brought by him claiming that he would be entitled to the rent at the original rate in spite of the earlier decree and that it would not have the effect of varying the contract between the parties under the Muchilika,

Held : the land lord could claim rent only at the rate provided for in the earlier decree on the application of S. 27 to such cases and not by the application of the principle of *res judicata.*

1947 Mad. 299 and 1929 Mad. 673 : Considered.

Mr. *G. R, Jagadisan* for Appt.

Mr. *N. C. Raghavachari* for Respt.

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7—10—1955. S. A. Nos. 74, 64 etc.

Krishnaswami Nayudu, J.

Marimuthuswami *v.* Ramakutti Goundan.

Indian Partnership Act, Ss. 30 and 37—Death of a partner — Dissolution—Legal representatives of the deceased partner entering into transaction—Rights of parties.

Though the rights of the representatives of the deceased partner to the assets of the partnership may not be based on contract for the reason that they are not partners nor even admitted to the benefits of the partnership, their right to the property of the partnership as representatives of the deceased partner would anyhow subsist. It cannot be considered that they have no right to the assets and their possession of such assets would be such possession as a trespasser might have. The representatives of the deceased partner, who himself was entitled to the property acquire such right to the property in their capacity as heirs or representatives of the deceased partner Their right to recover the deceased partner's share by partition or recovery of the property as such has not been provided for as a remedy under the Partnership Act, their only right being a suit for accounts, and it may not be open to them to institute a suit as such for recovery of the properties ; but their right to the property cannot be denied. If persons who have rights to the property are in possession of such property and if a suit relating to such partnership assets is barred there is nothing preventing the persons in possession, who are not strangers but who have certain rights in the property perfecting their title by any claim to such property becoming barred by lapse of time. The effect, therefore, of a suit for an account and a share in the partnership, the only remedy open to a representative of a deceased partner and the surviving partners, being barred not having been filed within 3 years as provided under Art. 106 of the Limitation Act, is that their right to the partnership property becomes extinguished and if such property had got into possession of any of the surviving partners or the representatives of the deceased partners such possession could not be disturbed and they acquire a valid and indefeasible title thereto.

57 Mad. 931 45 Mad. 378 ; and (1954) 2 M.L.J. 639 : Followed.

Mr. *M Natesan* for Appts.

Messrs. *D. Ramaswami Ayyangar* and *P. R. Varadarajan* for Respts.

V. C. S. ——

14—10—1955. S. A. No. 210 of 1952.

Krishnaswami Nayudu, J.

Gopinath Shetty (Minor) *v.* Santhamma.

Malabar Law, Aliyasanthana family—Adoption of a daughter—Effect—Severance from natural family—Custom—Hindu Law.

In a suit for maintenance by a member of the Aliyasanthana family against the natural family in which his maternal grandmother had been born and subsequently given away in adoption to another family, the plaintiff's case was that he would be entitled to maintenance from that family, and that the adoption of his maternal grandmother did not have the effect of severing her from the family, as adoption was purely a secular affair and had no religious efficacy, the only object of such adoption being to secure for the adoptee the properties of the family into which she had gone in adoption,

Held : The plaintiff would not be entitled to any rights. The concept of adoption is one derived under Hindu Law and the effect of adoption is that the adopted son occupied the same position and is entitled to

the same rights and privileges as the son born in the family to which he is adopted, the principle of engrafting into the family of adoption depending upon a total severance of the adoptee from the family of his birth. If that is the theory of adoption, in the case of those who have recourse to adoption for continuing the family, not under any system of law but by custom as in the case under consideration, *prima facie* it must be held that the severance from the family of birth would also apply to such an adoption, notwithstanding it is based on the customary law. It is reasonable to hold, therefore, that the rule in every case of adoption—whether the adoption is sanctioned by law or by custom and usage—is that it effects a severance from the family of birth, the adoptee becoming entitled to all the rights of the family to which he is adopted. If there is any custom contrary to the rule, then it is for those who rely on the custom to establish it. In the present case, the plaintiff has not proved the existence of such a custom. It is for the plaintiff, who pleads that notwithstanding the adoption the adoptee retained her rights in the natural family, to prove satisfactorily the existence of such a custom.

The likening of adoption under the Aliyasanthana system to that of *Krittrima* adoption does not mean that all the incidents of *Krittrima* adoption are attached to the customary adoption among those who are governed by the Aliyasantana system and that the adoptee retains the rights to his property in the natural family. The observations of text writers and Courts that such an adoption is more like the *Krittrima* adoption does not mean that adoption under the Aliyasantana system is purely secular and has no religious significance nor any religious background but only based on purely material considerations.

Mr. *S. Ramayya Nayak* for Appt.

Messrs. *M. K. Nambiar* and *A. Narayana Rao* for Respts.

V.C.S. ——

17—10—1955 W. A. No. 117 of 1954.

Rajamannar C.J. and Panchapakesa Ayyar, J.

The Commissioner, Hindu Religious and Charitable Endowments, Madras *v.* K. Sankaran Nair.

Madras Hindu Religious, and Charitable Endowments Act, and Constitution of India, Art. 226—Scope of High Court's power in an application for writ—Scheme framed for a temple—Modification partially—Permissibility.

In an application under Art. 226 of the Constitution of India for the issue of a writ of prohibition or other order restraining the respondents from enforcing against the petitioner the provisions of a scheme framed by the Hindu Religious Endowments Board as modified by the District Court and particularly restraining their exercise of any powers regarding the management of the temple, it is permissible for the Court to make any suitable direction. It is not correct to say that no part of the scheme can be salvaged and the whole of it must be set aside. So long as a scheme is necessary, even radical alterations of the scheme, can be made by way of modification of the original scheme. If the parties before the Court, in the circumstances of a case, have been able to submit to the Court an agreed scheme. which does not in any way offend the provisions of the Constitution, the best course in the circumstances would be to direct that the draft scheme, be attached to the order, and shall come into force from the date of the order in supersession of the scheme framed by the District Court.

The Advocate General and Mr. *V. Srinivasan* for the *Special Government Pleader* for the Appt.

Messrs. *V. P. Gopalan Nambiar, P. C. Balakrishna Menon, A. Achuthan Nambiar* and *P. Bhaskara Menon* for Respts.

V. C. S. ——

21—10—1955 W. P. No. 643 of 1954

Rajamannar, C. J. and Panchapakesa Ayyar, J.

Wahith Motor Service, *v.* The Regional Transport Authority.

Motor Vehicles Act, S. 133—Rules framed under the Act—Validity—Failure to place before the legislature—Effect.

The rules duly made and published under S. 133 (2) of the Motor Vehicles Act are valid and enforceable in spite of the omission of the State Government to place them before the Legislature as provided in S. 133 (2) of the Act.

If an enactment provides for rules made thereunder being laid before legislature but does not expressly specify the consequences of an omission to so lay them, the rules duly made and published can be enforced in spite of such omission.

The provision in S. 133 (3) of the Motor Vehicles Act is directory only and the omission on the part of the Government to lay the rules before the State legislature does not render the rules void and inoperative, because S. 133 (3) of the Act does not expressly say, as it could have said, that the rules shall not be enforced till they have been laid before Parliament or the State Legislature.

Metcalfe v. *Cox*, 1895 A.C. 328, *Munnalal* v. *H. R. Scott*, 1955 Cal. 451, and *Bailey* v. *Williamson*, 8 Q.B.C. 118 relied on. 1945, 7, F.C.R. 99 followed.

Messrs. *R. M. Seshadri, L. S. Veeraraghava Iyer* and *W. S. Venkataramanjulu* for Petr.

The Advocate General and *The Special Government Pleader* for Respts. 1 to 3.

Messrs. *M. K. Nambiar* and *T. Chengalvarayan* for the 4th Respt.

V. C. S. ——

10—11—1955 T. R. C. No. 64 of 1955.

Rajagopalan, J.

The Indian Coffee Board *v.* The State of Madras.

Madras General Sales Tax Act, S. 2 (b)—"Dealer" and "Sale"— Definitions- Constitution of India, Art. 286 (1) (b)—In the course of Export—Exemption—Scope.

Where under the terms of a contract between a registered dealer (Exporter) and the Assessee (India Coffee Board) the exporter was bound to export the coffee which he obtained from the Board, it was contended that in view of that clause and the other clauses in the contract, the transaction would not amount to a sale ;

Held: the contract only provided for re-transfer of ownership from the registered exporter to the Board, if the former defaulted performance of the conditions of the contract to export the coffee, which did not affect the transfer of ownership from the Board to the registered exporter. Therefore, the transaction was a sale. That the registered dealer was under an obligation, statutory or contractual, to use the goods he bought in a specified manner did not make the transaction between him and the Board anytheless a sale. That sale would not itself be a "sale in the course of export", to attract the exemption granted by Art. 286 (1) (b) of the Constitution.

A sale for transport outside the State does not alter the fact that the sale itself was Intra-State sale, a sale within the State of Madras. The subsequent transport by the purchaser is not part of the transaction of sale.

Decisions of the Supreme Court in the *United Motors Case*, *State of Travancore Cochin* v. *S. V. C. Factory*, and the *Bengal Immunity case* : Followed.

Mr. *M. Subbaroya Ayyar* for Petr.

The Advocate General and *The Assistant Govt. Pleader* for the Respt.

V.C.S. ———

10—11—1955 T. R. C. No. 58 of 1955.

Rajagopalan and Rajagopala Ayyangar. JJ.

Sri Sundararajan & Co. Ltd., *v.* The State of Madras.

Madras General Sales Tax Act (IX of 1939) as amended by the "Definition of Turnover and Validation of Assessment Act (XVII of 1954)—Definition of Turnover—Scope—Constitution of India, Sch. VII, List II, Entry 54.

The provisions of Act XVII of 1954 amending the definition of turnover in the main Act and validating assessments made under that Act are within the competence of the legislature and *intra vires*.

It is not the name that the legislature accords to a payment by a purchaser to a seller, who is a dealer as defined by the Act, that determines the question of the legislative competence. No doubt S. 8-B called the payment an amount (collected) by way of tax. It is equally true that the statutory liability to pay the sales tax is laid on the dealer; what is taxable is not each transaction of sale but the total turnover of the dealer, computed in accordance with the provisions of the Act and the rules. But it is well recognised that whatever be the form of the statutory provisions, the ultimate economic incidence of the tax is on the consumer, the purchaser. Even if the registered dealer collects the amount by way of tax under the authority of S. 8-B of the Act, the payment is by the purchaser on the occasion of the sale by the dealer. *Vis a vis* the dealer, it is in reality part of the price the purchaser has to pay the seller for purchasing the goods. A tax on such a payment, is well within the ambit of Entry 54 of List II, Sch. VII read with Art. 246 (3) of the Constitution

Scope of the Amending Act superseding the effect of the decision in *Krishnaswami Mudaliar's Case*, pointed out.

It is well settled that the power to validated illegal assessments made by executive authorities is incidental to the power to levy the tax. The pith and substance of the impugned Act was to validate the assessments made by the assessing authorities.

The Legislature had the competence to enact that as incidental to the declared objective of the Act, to validate the assessments for the period before 1-4-1954.

Werrin v. *Commenwealth*, .9 C.L.R. 150 and *United Province* v. *Atiqa Begum*, 1940 F.C.R. 110: Relied on.

Bata Shoe Co. v *Board of Revenue*, 1, S.T.C. 193; Followed.

(1944) 1, A.E.R, pp. 372 and 618: Considered.

Mr. *A. R. Krishnaswami* for Appt.

The Advocate General and *The Asst. Govt. Pleader* for Respt.

V. C. S. ——

15—11—1955. W. P. No. 159 of 1955.

Rajagopalan, J.

P. Ahamed Basha *v.* The Municipal Council, Vaniyambadi.

Madras District Municipalities Act. S. 249 read with Schedule 5,—Licence under—Storing of beedi leaves—Non-combustible material - Not necessary.

A demand under S. 249 of the District Municipalities Act read with Schedule 5, calling upon the owner of a premises to take a licence and pay licence fee for storage of beedi leaves is illegal. Though quite a number of things can be made to burn if they are set fire to, it cannot be said on an examination of the scheme of Schedule V, that beedi leaves fall within the scope of "Combustible" materials within the meaning of item (q). In the context in which item (q) appears, it would be more reasonable to construe the clause to mean "explosive and combustible materials" though the expression used in the Act itself is "Explosive or combustible materials". Beedi leaves cannot fall within the description of "Combustible materials", because a capacity to burn is not the only test for construing the expression "Combustible Materials."

1942, 2, M.L.J. 555 : Relied on.

Mr. *M. M. Ismail* for Petr.

Mr. *S. Ramachandra Ayyar* for the Respt.

V.C.S. ———

18—11—1955. W. P. No. 283 of 1954.

Rajagopalan, J.

Devayya Gowda *v.* Additional Dt. Magistrate, South Kanara.

Arms Act, S. 18—Cancellation of licence—Failure to give notice and to record reasons—Invalidity of the order—Constitution of India, Art. 226—Existence of alternate remedy—Exercise of jurisdiction—Permissibility.

Where a District Magistrate cancelled the licence granted to a person under S. 18 of the Arms Act without giving any notice to the holder and without recording his reasons in writing,

Held: the order was invalid and liable to be quashed under Art. 226 of the Constitution of India. Though an alternate remedy by way of appeal was provided under R. 41-A framed under the Arms Act which was not availed of by the aggrieved person, the fact of the recent enactment of that rule, and which the petitioner was not aware of, could be taken into consideration by the Court for granting the relief.

Decision in W. P. No. 499 of 1953: Followed.

Mr. *A. Narayana Pai* for the Petr.

The Special Government Pleader on behalf of the Respt.

V.C.S.

23—11—1955. W. P. No. 149 of 1955.

Rajagopalan, J.

V. Murugesan *v.* The Collector of Tanjore, Tanjore.

Madras Civil Services (Classification, Control and Appeals) Rules, R. 17-b (i) and (ii)—Scope.

Rule 17 (b) (ii) of the Service Rules directs that the person charged should be given a copy of the report only of the enquiring authority; but the rule itself makes it clear that the report referred to is the report of the Officer who conducted the enquiry referred to in R. 17 (b) (i). The failure to furnish the aggrieved person with a copy of the report of the District Supply Officer would not, therefore, constitute breach of any specific rule. In these circumstances of this case, it did not violate any principle of natural justice either, nor did it amount to denial of a real and effective opportunity to the petitioner to defend himself against the charges.

The fact that the Government acting in revision ultimately consulted the Public Service Commission before disposing of the petition by the Government, cannot be urged as vitiating the exercise of their jurisdiction or that they acted on irrelevant materials.

Messrs. *R. M. Seshadri* and *R. Rajagopala Ayyar* for Petr.

The Special Government Pleader for Respt.

V. C. S.

END